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National “Harmony”: An Inter-Branch Constitutional Principle and Its Application to Diversity Jurisdiction

Jesse M. Cross
Yale Law School

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National “Harmony”: An Inter-Branch Constitutional Principle and Its Application to Diversity Jurisdiction

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I. INTRODUCTION

In Section 2 of Article III of the Constitution, the judicial power of federal courts is extended to legal controversies that arise between citizens of different states.¹ This grant of federal power is known to

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* Yale Law School, J.D. 2011; University of California, Irvine, M.A. 2006. I particularly wish to thank Bruce Ackerman and Jack Balkin for the generous and helpful feedback they provided with respect to early drafts of this Article. Additionally, I wish to thank William Eskridge, Carol Rose, John Witt, and Akhil Reed Amar, each of whom provided instruction that informed the argument developed in this Article. I am very fortunate to have learned from such wonderful teachers.

1. The relevant portion of Section 2, Article III reads:

modern-day lawyers as creating federal court “diversity jurisdiction” with respect to such controversies, but the delegates to the Constitutional Convention never referred to this Article III power as a grant of “diversity jurisdiction.”² Instead, the Founders would commonly present diversity jurisdiction in the language used by Edmund Randolph at the Constitutional Convention: there was a need for a federal judicial power to protect “the *harmony* of states and that of the citizens thereof,” Randolph said.³

When making this statement, Randolph was not telling the Convention anything it had not heard many times before. In important drafts of Article III,⁴ in supporting statements made by delegates at

The judicial Power shall extend . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2. Each of these grants of jurisdiction can be considered a grant of “diversity jurisdiction.” This Article will focus on jurisdiction between citizens of different states, though its analysis will be based on a principle that reaches to all forms of diversity jurisdiction that do not involve assertions of jurisdiction over foreign (i.e., international) parties.

2. For example, a search for the term “diversity jurisdiction” in the database of congressional documents and debates maintained by the Library of Congress for the period of 1774 to 1875 reveals no instances of the term “diversity jurisdiction” being used. This database includes records of the Continental Congress, the Constitutional Convention, and the United States Congress. *A Century of Lawmaking For a New Nation: U.S. Congressional Documents and Debates, 1774–1875*, THE LIBRARY OF CONGRESS, <http://memory.loc.gov/ammem/amlaw/lawhome.html> (last visited Mar. 23, 2014), archived at <http://perma.unl.edu/CSQ8-XN9Q>. For early uses and evolution of the term, see, for example, *Meyer v. Del. R.R. Constr. Co.*, 100 U.S. 457, 481 (1879) (Bradley, J., concurring); *Petterson v. Chapman*, 19 F. Cas. 385, 387 (C.C.N.D.N.Y. 1876) (No. 11,042); *Miller v. City of New York*, 17 F. Cas. 341, 342 (C.C.S.D.N.Y. 1876) (No. 9585).
3. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 238 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Yates’s Notes, June 13, 1787) (statement of Edmund Randolph) (emphasis added). Randolph similarly would tell the Virginia Convention: “[An object of the national judiciary] is to perpetuate harmony between us and foreign powers Harmony between the States is no less necessary than harmony between foreign states and the United States. Disputes between them ought, therefore, to be decided by the federal judiciary.” 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 570 (Jonathan Elliot ed., 2d ed. 1866) [hereinafter DEBATES]. Randolph’s opinions are of particular interest, as he would help draft the final text of the Diversity Clauses in the Committee of Detail. See *infra* notes 71–73 and accompanying text.
4. In such drafts, the reference was consistently to jurisdiction over questions that involved “national peace and harmony.” See 1 FARRAND’S RECORDS, *supra* note 3, at 22 (Madison’s Notes, May 29, 1787) (Resolutions proposed by Edmund Randolph) (providing jurisdiction over “questions which may involve the national peace and harmony”); *id.* at 223–24 (Journal, June 13, 1787) (Resolution pro-

the Convention,⁵ and in the subsequent explanations offered in *The Federalist Papers*,⁶ the Founders repeatedly spoke of an Article III power—today known as diversity jurisdiction—over controversies that implicated the “harmony” between the states.⁷

At the same time that the Convention’s delegates were outlining this federal judicial power, they also were assembling a list of basic principles that would guide the Committee of Detail in its drafting of the congressional powers today found in Article I, Section 8.⁸ Included among these was a principle that echoed the Convention’s thinking about diversity jurisdiction: the notion that the federal legislature should have power to legislate in instances “in which *the harmony of the United States* may be interrupted by the exercise of individual Legislation.”⁹ This need for congressional powers pertaining to national “harmony” was consistently asserted by the Founders in the same texts and debates that discussed the need for a similar Article III power.¹⁰

The concept of national “harmony” played a central role, it seems, in the drafting process of both Article I and Article III. Consequently, it would be reasonable to expect that constitutional scholars would have spent a great deal of time examining this concept. This has not been the case, however. Despite a significant body of originalist scholarship discussing the various clauses that pertain to national “har-

posed by Edmund Randolph providing jurisdiction over “questions which involve the national peace and harmony”); 2 FARRAND’S RECORDS, *supra* note 3, at 39, (Journal, July 18, 1787) (Draft resolution providing jurisdiction over “such other questions as involve the National peace and harmony”); 2 FARRAND’S RECORDS, *supra* note 3, at 147 (Draft of Committee of Detail) (providing jurisdiction over cases “involving the national peace and harmony”). For a discussion of the relationship of “national peace” to the concept of national “harmony,” see *infra* notes 38–40 and accompanying pages.

5. See, e.g., 1 FARRAND’S RECORDS, *supra* note 3, at 238 (Yates’s Notes, June 13 1787) (statement of Edmund Randolph that the jurisdictional provision of the Constitution would be drafted “to preserve the harmony of states and that of the citizens thereof”); 1 FARRAND’S RECORDS, *supra* note 3, at 252 (Madison’s Notes, June 16, 1787) (statement of James Wilson explaining that “jurisdiction is to extend to all cases affecting the Natl. peace & harmony” under the new Constitution).
6. See *infra* notes 75–76.
7. This was not the only phrase the Founders used to label and describe diversity jurisdiction. See, for example, the references to “national peace” in *supra* note 4, the references to “proper intercourse” in *infra* notes 75–76, and the Virginia Plan’s reference to cases in which “citizens of other States . . . may be interested.” 1 FARRAND’S RECORDS, *supra* note 3, at 22 (Madison’s Notes, May 29, 1787) (Resolution proposed by Edmund Randolph). However, it was a phrase that they used with unparalleled consistency in discussions of this jurisdictional grant.
8. 1 FARRAND’S RECORDS, *supra* note 3, at 21 (Madison’s Notes, May 29, 1787) (Resolutions proposed by Edmund Randolph).
9. *Id.* (emphasis added).
10. See, e.g., *infra* notes 122, 139, 141–42 and accompanying text.

mony," there is a dearth of academic studies examining whether the concept of national "harmony," as it was understood in eighteenth-century America, might provide insight into the intended scope and purpose of these clauses.¹¹

The following pages offer such a study. They attempt to rediscover the original, Founding-era meaning of the concept of national "harmony"—and, while focusing in particular on the Article III application of this concept, they nonetheless aim to reveal the essential role that this concept played in shaping a host of constitutional clauses, both within Article III and beyond it. In so doing, they hope to begin a discussion about an inter-branch principle of national "harmony" that has not yet received adequate attention.

In order to rediscover the original meaning of this principle, it first will be necessary to understand the rhetorical context that gave the term "harmony" its paradigmatic meaning in eighteenth-century America. For the Founders, the following pages will explain, this context was provided by Enlightenment science. Eager to draw upon the legitimacy of the physical sciences, the Founders were quick to model their political analyses after the foundational scientific studies of their era. This was an important tendency on the part of the Founders, as the term "harmony" served a specific function in eighteenth-century scientific discourse: the term was used to describe the interactions occurring between the different planets that comprised the larger solar system.¹² The Founders self-consciously borrowed from this rhetorical tradition in their use of the term "harmony." In so doing, they made it clear that their many references to national "harmony" were designed to isolate and identify those matters that, much like the vectors of gravitational force that extended between independent planets, were observed to extend across several states.

When constitutional clauses are viewed as addressing activities that involve national "harmony," therefore, these clauses begin to appear animated by a principle very similar to that which some scholars have previously attributed to specific Article I powers. Akhil Amar, for example, has suggested that the Commerce Clause can be viewed as founded upon the principle that: "if a given problem genuinely

11. For a detailed discussion of this body of scholarship, and of the tangential role that the Founders' references to national "harmony" has played in this scholarship, see *infra* Part III. At least one study has noted the centrality of the concept of "harmony" to diversity jurisdiction, but even this study defined this concept of "harmony" without conducting any detailed study of its use in the nineteenth century. See Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 199–205 (1982) (presuming that national "harmony" refers to the maintenance of good relations between the states).

12. See *infra* notes 80–86 and accompanying text.

spilled across state or national lines, Congress could act.”¹³ Scholars such as Amar are correct in linking this principle to specific Article I clauses, the following pages will argue, but they are incorrect in confining its operation to these individual clauses. The Founders held a vision of federal power that extended across Articles I and III, a vision of the federal government providing oversight of those matters that involved national “harmony” because they gave rise to interests that extended across state lines.

In the following pages, this inter-branch vision will be highlighted, and the question will be asked: what purpose was this vision designed to serve? The mere existence of this vision, it will be argued, suggests that the Founders were not simply interested in remedying isolated problems that they had observed under the Articles of Confederation. Instead, it suggests that they were acting upon a more fundamental objection to the prevailing theory of sovereignty—a theory that shaped and limited the operation of government in its several branches.

Just as today, the prevailing theory of sovereignty in the eighteenth century defined the state as a territorial entity, and this definition had the consequence of sharply curtailing a state government’s ability to act beyond its borders.¹⁴ This territorial constraint cut across the legislative and judicial branches in the limitations it placed on a government, imposing a host of impediments upon a state’s effort to take appropriate action upon any problem that extended across multiple states. These impediments directly undermined any state government’s ability to achieve the Founders’ standard of good governance with respect to interstate matters—a standard embodied in Publius’s repeated assertions that “every power ought to be commensurate with its object.”¹⁵ According to this standard, a government’s powers should be as expansive as the “objects” those powers would govern. Only then, the Founders suggested, would a government be free to pursue the most fair, full, and efficient solutions to the problems assigned to it.¹⁶

When the Constitution is viewed through the lens of national “harmony,” in other words, a vision emerges of a geographically “commensurate” federal government—a vision that would be implemented by a collection of clauses spread across Articles I and III. Clause by clause, the Constitution systematically identified areas of activity that gave

13. AKHIL AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 108 (2005).

14. See STEPHEN D. KRASNER, *POWER, THE STATE, AND SOVEREIGNTY: ESSAYS ON INTERNATIONAL RELATIONS* 193 (2009) (explaining that this model of sovereignty is “an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures.”).

15. *THE FEDERALIST* NO. 31, at 161 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

16. See *infra* notes 196–206 and accompanying text.

rise to entangled interests across several states—whether the area of activity was defined as *commerce*, as *postal mail*, as *defense*, or as *legal controversies*, just to name a few.¹⁷ The result was a collection of clauses that together constituted a coherent effort to target those areas of activity that would persistently bring states up against the territorial limits on their powers.

This is the argument that will be developed over the course of the following pages. It is an argument that focuses on the role that an organizing metaphor—the metaphor of national “harmony”—played in shaping a host of constitutional provisions found in Articles I and III. As such, it is a study that has methodological implications for the practice of constitutional interpretation—implications that are found in its refusal to employ a clause-bound method of interpretation.¹⁸ Clause-bound methods of interpretation, which are defined by a belief that each constitutional clause can be studied and adequately understood in isolation from each other constitutional provision, continue to prevail among constitutional scholars.¹⁹ By contrast, the argument in this Article will not focus exclusively on the text and history of an individual constitutional clause. Instead, it will examine the way in which the drafters at the Constitutional Convention used an organizing metaphor to guide them in their efforts to transform an overarching principle into a host of individual clauses. According to this argument, the original meaning of these clauses only becomes fully apparent when viewed as individual parts of a larger effort to implement this organizing metaphor—a view foreclosed to those who adopt a clause-bound method of interpretation.

This Article is not the first to reject the clause-bound approach to constitutional interpretation. John Hart Ely and Akhil Amar have both criticized the clause-bound approach as fundamentally inadequate, for example, and this Article builds upon their critiques. At the same time, however, this Article’s approach differs from those taken by both Ely and Amar. Like Ely’s study in *Democracy and Distrust*, this Article looks to the general principles expressed by the text of the Constitution as a whole.²⁰ Unlike Ely’s study, however, this Article does not rely on the “representation-reinforcing” themes that are central to Ely’s analysis.²¹ Like Amar’s analysis in his 1999 article, *Intratextualism*, the present Article engages in “intratextualism,”

17. U.S. CONST. art. I, § 8; U.S. CONST. art. III, § 2.

18. I follow John Hart Ely in referring to this as a “clause-bound” method of interpretation. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 12 (1980).

19. Virtually all of the notable interpretations of the Diversity Clauses have adopted a clause-bound method of interpretation, for example. For a survey of this scholarship, see *infra* Part II.

20. Ely, *supra* note 18, at 87.

21. *Id.*

showing how a specific constitutional provision should be read in connection with other key clauses found in Articles I and III.²² Unlike Amar’s version of intratextualism, however, the present Article does not set out to identify the ways in which the final text of the Constitution deploys the same recurring phrases in different contexts, a strategy Amar uses to invite the reader to integrate these formulae into overarching concerns.²³ Instead, this Article relies on the way Convention draftsmen used an organizing metaphor to produce various clauses scattered throughout the final text of the Constitution—clauses that did not always emerge from the Committee of Detail in a form that would invite the type of intratextualist analysis endorsed by Amar. In these senses, the present Article offers a novel alternative to the clause-bound method of interpretation.

In order to understand the organizing metaphor that is at the center of this novel methodology, it will be necessary to engage in a close examination of constitutional vocabulary. References to *national harmony*; discussions of *partial powers*; analyses of *general interests*; portrayals of *bodies politic*; praise for *comprehensive governments*—for the Founders, these phrases had specific meanings. The following pages will undertake the task of reconstructing these meanings, and the definitions they discover will all share a common theme: geography. These terms, it will be observed, consistently conjured a vision of the nation as a territorial entity. Once we learn to see this conjured vision, we also will be able to appreciate the extent to which the constitutional clauses relating to national “harmony” emerged from a geographic focus—a focus that insisted upon the need to identify, and to provide federal power over, those activities that spilled across state lines.

In an effort to begin a larger discussion about the role of this organizing metaphor of national “harmony,” the following pages focus in particular on the Article III application of this metaphor, examining its implications for the practice of diversity jurisdiction in our federal courts. When viewed as one part of a larger attempt to create a geographically commensurate government, I argue, diversity jurisdiction is revealed to target a specific problem: the set of territorial constraints that hinder state courts in their efforts to adjudicate multistate legal controversies. As such, this harmony-based vision of the Diversity Clauses has at least three noteworthy implications regarding the proper role of federal courts in our nation’s legal system.

First, this new vision provides a broad constitutional foundation for congressional statutes that rely on the Diversity Clauses in order to create new areas of federal court jurisdiction. It is a foundation

22. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

23. For Amar’s discussion of this methodology, see *id.* at 788–802.

that reaches many enacting statutes that extend federal court jurisdiction to interstate controversies, even when these controversies do not pose an obvious threat of judicial bias against out-of-state litigants. This point will be illustrated through an analysis of the much-debated Class Action Fairness Act of 2005 (CAFA)—a statute that, according to the harmony-based vision of diversity jurisdiction, has a stronger claim to constitutionality than has previously been assumed.²⁴

Second, the harmony-based vision of diversity jurisdiction holds lessons for those who shape our nation's rules of federal court personal jurisdiction. Consistently since the Judiciary Act of 1789, personal jurisdiction rules have tied federal courts to the very constraints that diversity jurisdiction was designed to allow them to transcend: the constraints created by states' territorial borders. As a result of these constraints, there was no judiciary in America that was adequately empowered to oversee the new national economy that emerged in the early decades of the twentieth century.²⁵ Yet as interstate legal controversies rapidly accumulated on account of this new interstate economy,²⁶ and as the Court restored a broad vision of Congress's power under the Commerce Clause,²⁷ neither Congress nor the Court returned to the Founding vision of a similarly empowered federal judiciary. For those who take an originalist approach to constitutional interpretation, this harmony-based approach to diversity jurisdiction will suggest that Congress should have relaxed these personal jurisdiction standards in the first half of the twentieth century. It is an argument which suggests that modern-day originalists similarly may want to urge Congress to relax these standards for federal courts in the future.

Instead of following the Founders' design by expanding federal court personal jurisdiction, the New Deal Congress left it to the Court to address the need for judicial oversight of our modern interstate economy. Beginning with the 1945 case of *International Shoe v. Washington*,²⁸ the Court accomplished this task by relaxing state court personal jurisdiction standards. As I will explain in a future article, these innovations in state court personal jurisdiction by the Court can be viewed as legitimate under at least one non-originalist

24. See *infra* notes 63–68, 248–54 and accompanying text (explaining that CAFA's emphasis on efficient adjudication of complex multistate cases fits within the purposes that underlie the harmony-based vision of diversity jurisdiction).

25. For the Court's acknowledgement that its doctrinal innovations in state court personal jurisdiction were an attempt to address this problem, see *infra* note 243 and accompanying text.

26. See *infra* note 235.

27. See *infra* notes 235–38 and accompanying text.

28. 326 U.S. 310 (1945).

theory of constitutional legitimacy.²⁹ Nonetheless, the foregoing pages do highlight the downside of this state-centric approach to managing the jurisdiction-related problems that arose in the interstate economy: namely, this approach put the Court in the position of discarding the basic territorial concept of state sovereignty without easy recourse to any ready-made substitute. The result has, in some senses, been a confused doctrine of state court personal jurisdiction³⁰—a result that likely could have been avoided if Congress had chosen to implement the solution that the Founders provided for a nation predominated by interstate business. This new perspective on twentieth-century developments in state court personal jurisdiction provides the third substantive lesson to be learned from the harmony-based vision of diversity jurisdiction.

This argument will be divided into eight Parts. Part II provides context by offering a historical survey of the theories that have been advanced throughout our nation’s history regarding the original purpose of diversity jurisdiction. Part III then turns to the central project of the present Article: it aims to rediscover the Founders’ idea of national “harmony,” and it outlines the inter-branch theory of diversity jurisdiction that emerges from a close study of this idea. Part IV reinforces this interpretation by examining an additional analogy that Publius used to describe the harmony-based powers: the analogy of these powers, including diversity jurisdiction, as applying to “circulatory” or “nervous” systems that extend across the sovereign organs of the body politic. Part V then turns to the final text of Article I and Article III in order to show that, at least according to *The Federalist Papers*, this text was understood by the Founders to carry out their harmony-based vision of federal power, including with respect to diversity jurisdiction.

Part VI examines the underlying purpose that animated the harmony-based approach to federal power: the desire to prevent state boundaries from operating as obstacles to efficient and effective governance, including in the resolution of multistate legal controversies. This desire was a natural outgrowth of the Founders’ theory of good governance, Part VI explains, a theory that insisted upon governments that were geographically commensurate to the problems they were assigned to manage.

29. Jesse M. Cross, Revisions of Sovereignty: The New Deal Revolution and its Implications for Personal Jurisdiction (July 17, 2014) (unpublished manuscript) (on file with author). I will argue that these innovations can be viewed as the results of what Bruce Ackerman has termed the “higher lawmaking process” that occurred during the New Deal. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 8 (1998).

30. See, e.g., *infra* notes 246–47.

Lawyers and scholars often presume that the original purpose of diversity jurisdiction was to prevent state court bias against out-of-state litigants, and Part VII examines the relationship that the harmony-based theory bears to this oft-repeated idea. Part VIII concludes by examining the implications this harmony-based theory holds for the constitutionality of the Class Action Fairness Act of 2005, and for doctrines of personal jurisdiction for state and federal courts.

II. THEORIES OF DIVERSITY JURISDICTION: A HISTORICAL OVERVIEW

Throughout our nation's legal history, most lawyers and scholars have presumed that federal court diversity jurisdiction was originally designed to address the problem of state court bias against out-of-state litigants. As a prominent textbook on federal practice and procedure recently observed: "[T]he traditional explanation, and the one most often cited by federal judges and legal scholars, of the purpose of the constitutional provision for diversity of citizenship jurisdiction and its immediate congressional implementation [is] the fear that state courts would be prejudiced against out-of-state litigants"³¹ This prevention-of-bias justification has, as Edward Purcell puts it, consistently provided "the stock rationale of diversity jurisdiction."³²

In the years since the Founding, there have been some notable examples of lawyers, judges, politicians, and scholars who have suggested that diversity jurisdiction was motivated by different rationales, however. A survey of these alternatives is helpful in understanding the ways that a harmony-based theory of diversity jurisdiction builds upon, and differs from, preceding theories of diversity jurisdiction.

The first of these alternative theories was articulated by John Marshall in his famous discussion of diversity jurisdiction in *Bank of the United States v. Deveaux*.³³ In *Deveaux*, Marshall suggested that diversity jurisdiction was designed not only to allow out-of-state parties to avoid actual bias, but also to allow these parties to avoid litigating before tribunals that the parties themselves might perceive as potentially biased.³⁴ As Marshall put it:

31. 13E CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §3601 at 13–15 (3d ed. 2009).

32. Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdiction Reform*, 156 U. PA. L. REV. 1823, 1847 (2008). See also Debra Lyn Bassett, 81 WASH. U.L.Q. 119, 119–20 (2003) ("The traditional, most common explanation of diversity jurisdiction's purpose is the protection of out-of-state litigants from local bias by state courts.").

33. 9 U.S. (5 Cranch) 61 (1809).

34. *Id.* In the Virginia ratifying convention, by contrast, Marshall had defended diversity jurisdiction in language echoing the concerns about private wars articulated in *Federalist* 80, arguing that diversity jurisdiction would operate to

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.³⁵

From this perspective, diversity jurisdiction might serve the additional function of promoting the rule of law by instilling confidence that cases and controversies are being resolved by neutral tribunals, and it might serve to promote intercourse between the states by reassuring wary parties that interstate activities or transactions will not subject them to suits in state courts that might be infected with local bias.

Marshall's interpretation in *Deveaux* has proven to be the most enduring nineteenth-century interpretation of the original purpose of diversity jurisdiction.³⁶ It was not the only interesting alternative theory of diversity jurisdiction developed in the antebellum years, however. As Michael G. Collins has chronicled, Congress attempted in 1842 to amend federal *habeas corpus* statutes, and in their efforts to justify this exercise of jurisdiction, several senators defended a very different view of diversity jurisdiction: it was meant to create a broad judicial power, they argued, to oversee controversies involving foreign relations.³⁷

In the course of these congressional discussions, senators defending the act made a presumption about the phrase "National peace and harmony" that scholars continue to repeat into the present day. Since Senators Choate, Berrien, and Walker all assumed that the phrase "National peace and harmony" was a reference to a desire to avoid armed conflict, they also assumed that the references to national "har-

"preserve the peace of the Union" Speech of John Marshall (June 20, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1434 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

35. *Deveaux*, 9 U.S. (5 Cranch) at 87. Henry Friendly has referred to this as "the classic statement" of the anti-bias argument. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 (1928).

36. For important reassertions of this view by the Court, see, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."); *Scott v. Sandford (Dred Scott)*, 60 U.S. 393 (1856) (Curtis, J., dissenting) ("Its purpose was, to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States . . .").

37. See, e.g., CONG. GLOBE, 27th Cong., 2d Sess. app. at 538 (1842) (Sen. Choate) ("Civil suits by a State against aliens are triable in the national courts, for the preservation of the national peace. Why should not criminal charges, also . . . be so tried on the same policy?"). See discussion in Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L. 649, 681–85 (2002).

mony” in early drafts of the Constitution were redundant with the emphasis on preserving “National peace.”³⁸ While some scholars have argued in recent decades for a broader interpretation of the phrase “National peace and harmony,”³⁹ this conflation of national “harmony” with “National peace” has been repeated by the majority of scholars who have examined this phrase.⁴⁰

After Marshall’s seminal opinion in *Deveaux* and Congress’ debate over the Act of 1848, few legal commentators added lasting voices to

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38. CONG. GLOBE, 27th Cong., 2d Sess. app. at 537 (1842) (Sen. Choate) (“The principle which [the Founders] adopted, as I have shown, was, that [the federal judiciary] should have cognizance of ‘all questions involving national peace and harmony.’ . . . Did not the committee of detail frame this enumeration—did not the convention receive and adopt it—expressly and exactly as embodying, expanding, and executing the whole of the great principle which had been resolved upon? Did not everybody understand that, under one or another, or all of the cases and controversies enumerated, were comprehended all questions whatever of a judicial nature, affecting the national peace?”). *See also id.* at 444 (Sen. Berrien) (arguing the Constitution authorized federal intervention in *habeas corpus* cases involving persons “pleading an act authorized by the law of nations or by the commission or authority of a foreign State” because it would be a means of fostering good will and preventing quarrels between nations.); *id.* at app. 613–14 (Sen. Walker) (equating a power over “questions involving national peace and harmony,” in part, with a power “to become the arbiter of the peace of nations”). *But see id.* at app. 537 (Sen. Choate) (“Why, what is the policy on which you have, and may assert jurisdiction of these small civil suits against aliens? Confessedly and notoriously this only—to preserve, undisturbed, harmonious intercourse with the rest of the world.”). For more on the Founding concept of “intercourse” and how it interacted with the idea of national “harmony,” see *infra* notes 105–07 and accompanying text.
39. Eric J. Segall has alluded to an interpretation of the phrase “National peace and harmony” as reaching all interstate matters, for example, although Segall is primarily focused upon arguing that even non-diverse legal controversies can fall within the purpose of preserving “National peace and harmony” if these controversies involve a “matter[] of national interest.” Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361, 367–68 (2002). Carole E. Goldberg-Ambrose has similarly focused upon the contribution that the phrase “National peace and harmony” makes to our understanding of federal question jurisdiction, and also has offered a broad interpretation of this phrase’s implications for diversity jurisdiction, though she sees it as more directly connected to the substantive value of promoting uniformity in law throughout the nation (even when the law being interpreted by federal judges is state law). *See* Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 586–88 (1983). *See also* Marsh, *supra* note 11 (presuming that national “harmony” refers to the maintenance of good relations between the states).
40. *See, e.g.*, John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 11–12 (1948); Dawn Levy, *Where Do Dead Corporations Live?: Determining the Citizenship of Inactive Corporations for Diversity Jurisdiction Purposes*, 62 BROOK. L. REV. 663, 666 (1996) (arguing that “harmony” pointed toward a desire to “reduce the friction between citizens of the different states”); James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 18 (1964).

the discussion of diversity jurisdiction until the first decades of the twentieth century. It was then that diversity jurisdiction received new and stinging critiques from several of the nation's most formidable legal minds. The degree of hostility with which legal thinkers of the prewar period viewed diversity jurisdiction is evinced by the fact that Louis Brandeis at one point enlisted Felix Frankfurter and Henry Friendly to draft a series of bills to restrict diversity jurisdiction, several of which were introduced in the House of Representatives and one of which was introduced in the Senate.⁴¹

For Frankfurter, diversity jurisdiction was designed primarily to avoid state court bias against out-of-state parties.⁴² By contrast, Henry Friendly—who began thinking about jurisdictional issues as one of Frankfurter's students⁴³—argued that the standard justification of diversity jurisdiction lacked historical support.⁴⁴ In place of this stock rationale, Friendly suggested diversity jurisdiction was included in Article III as a protection for creditors who worried that state legislatures and state courts might be vulnerable to the populist, anti-creditor sentiments then prevailing throughout the nation.⁴⁵ Put differently, Friendly advanced a new, modified version of the prevention-of-bias rationale: he argued that diversity jurisdiction was designed to allay fears that state courts might be biased against foreign and eastern capitalists.

This argument nicely embodies several trends that have emerged in interpretations of diversity jurisdiction in the seventy-five years since Friendly first published it—and, indeed, his argument has played a significant role in encouraging these trends. First, others have joined Friendly in the belief that diversity jurisdiction was designed to serve some role in promoting and protecting commercial in-

41. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 144–45 (2000).

42. See, e.g., *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring); *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting). See also Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *CORNELL L.Q.* 499, 521 (1928) (arguing the Constitution entertains "apprehensions" of local bias against out-of-state suitors). But see FELIX FRANKFURTER & JAMES MCCAULEY LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 8–9 (1927) (noting that the anti-bias rationale bore a connection to the promotion of commerce).

43. See Purcell, *supra* note 41, at 144.

44. Friendly, *supra* note 35.

45. *Id.* at 496–98 (arguing that "the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction," and that there were similar "grounds for distrust of the local courts" that was opposed to "a vague feeling that the new [federal] courts would be strong courts, creditors' courts, business men's courts.").

terests.⁴⁶ Friendly was not the first to perceive this aspect of diversity jurisdiction, of course. Daniel Webster had emphasized the relationship diversity jurisdiction bore to interstate commerce in an argument to the Court in the 1827 case of *Ogden v. Saunders*,⁴⁷ for example, and William Taft observed in 1922 that: “No single element . . . in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases.”⁴⁸ Friendly introduced a new and forceful version of this argument, however, and a variety of subsequent scholars have self-consciously followed his lead.⁴⁹

Friendly’s argument also is emblematic of subsequent scholarship because it connected this commercial theory of diversity jurisdiction to a profound skepticism regarding the ongoing value of diversity jurisdiction. As Edward Purcell has documented, Friendly advanced his theory at a time when there was growing frustration with what many viewed as the manipulative use of diversity jurisdiction by corporations in America.⁵⁰ While many of the underlying factors that led Frankfurter, Friendly, and Brandeis to oppose diversity jurisdiction had vanished by the middle of the twentieth century, diversity jurisdiction continued to be viewed as a tool utilized primarily by corporate interests, and the collection of lawyers, judges, and scholars who supported its abolition only continued to grow as the twentieth century

46. Interestingly, Friendly also cast skepticism on the idea that the phrase “National peace and harmony” was designed to reference diversity jurisdiction. “To be sure,” Friendly said, “it hardly seems that a dispute between a New Yorker and a Rhode Islander on a five hundred dollar note would, even in 1787, be a question involving ‘the National peace and harmony.’” Friendly, *supra* note 35, at 485–86. For Friendly, this reference to “National peace and harmony” was a placeholder that the Founders likely inserted so they could later revisit the question of whether to include or exclude diversity jurisdiction in the Constitution. *Id.* For scholars who continue to hold this interpretation, see, e.g., Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of Federal Courts, 1989 DUKE L.J. 1421, 1464 (1989); Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 92 n.76 (1995).

47. 25 U.S. 213, 237 (1827).

48. William H. Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922).

49. See, e.g., TONY ALLAN FREYER, *FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY* (1979) (arguing that it was to promote uniformity and predictability in the law for those engaged in interstate commerce); Frank, *supra* note 40 (arguing that diversity jurisdiction was to facilitate interstate trade and to create a sympathetic forum for business interests); Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. Rev. 997 (2007) (arguing that it was intended to increase the number of juries that were composed of people who lived in commercial centers); William L. Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A. J. 379 (1960).

50. Purcell, *supra* note 41, at 141–64.

progressed.⁵¹ A narrative emerged within the legal community that presented diversity jurisdiction as pitched between rational legal minds interested in good governance, on the one hand, and powerful corporate interests, on the other. In the ensuing years, Justices Jackson,⁵² Warren,⁵³ and Burger⁵⁴ all would endorse its abolition. In 1978, the House of Representatives passed a bill that would have eliminated diversity jurisdiction.⁵⁵ In 1990, a congressionally-commissioned report by the Federal Courts Study Committee concluded that diversity jurisdiction should be abolished, saying: "In most diversity cases . . . there is no substantial need for a federal forum."⁵⁶ That same year, Larry Kramer could say: "Every administration since President Carter's, the Judicial Conference, the American Law Institute, state courts, numerous public interest and legal aid organizations, and most legal scholars support the abolition or curtailment of diversity."⁵⁷

These calls for the abolition of diversity jurisdiction gained further support from those who presumed that diversity jurisdiction was designed to combat state court bias against out-of-state litigants. According to these critics, the burden that diversity jurisdiction places

51. As Purcell explains, diversity jurisdiction received renewed attention in the 1920s and 1930s (including by Frankfurter and Friendly) in large part because it aligned in those years with "substantive due process, the federal labor injunction, and the lawmaking independence of the national judiciary" to make diversity jurisdiction a powerful tool for corporations looking to thwart the labor movement that was blossoming in America during those decades. Purcell, *supra* note 41, at 72. As Purcell explains, however:

The abolition of *Swift* together with improvements in transportation and judicial administration eliminated many of the burdens that had made the federal courts disadvantageous venues for individual plaintiffs, while new procedural and jurisdictional rules often assisted those same plaintiffs substantially in suing corporate defendants. Further, Democratic appointments to the lower federal bench made the national courts increasingly attractive to individual claimants. By the late 1940s, one of the basic premises that had animated Progressives—that diversity jurisdiction seriously burdened individuals who sued national corporations—had been essentially eliminated.

Id. at 200.

52. ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 38 (1955).

53. See H.R. Rep. No. 95-893, at 1 (1978).

54. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 23, 28 (A. Leo Levin & Russell R. Wheeler eds., 1979). See also Warren E. Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A. J. 1125, 1126 (1973) (stating diversity jurisdiction has had no validity "for at least a generation.").

55. H.R. 9622, 95th Cong. 2d Sess. sec. 1(b) (1978). This bill was never voted on in the Senate.

56. FED. COURTS STUDY COMM., *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* 40 (1990).

57. Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 98 (1990).

on federal court dockets is no longer justified because state court bias has, in their opinion, largely vanished. As Erwin Chemerinsky has phrased it: “Diversity jurisdiction is perceived as an anachronistic relic by those who believe that its original justifications are no longer valid.”⁵⁸ One can hear this criticism, for example, in the statement by the American Law Institute that “there is no longer the kind of prejudice against citizens of other states that motivated the creation of diversity jurisdiction.”⁵⁹ The implication is clear: if local bias has been substantially eliminated from the state courts, then diversity jurisdiction serves no remaining function, and it probably can be curtailed without significant harm to our legal system.

Another argument on behalf of diversity jurisdiction that received increased attention in the latter half of the twentieth century was the argument that federal courts are staffed by judges that are, or that are perceived to be, of a higher quality than those found in state courts. This argument often has relied upon empirical studies of present-day state and federal courts rather than upon originalist arguments about the Founding-era purpose of diversity jurisdiction.⁶⁰ However, some scholars have pointed toward structural features of the federal judiciary embedded in Article III (such as life tenure and fixed salaries for federal judges) as evidence that the Founders intended to create a judiciary that would draw superior talent to the federal bench.⁶¹ Building upon this argument, some have argued that diversity jurisdiction was designed to divert additional cases to this superior bench.⁶²

In the twenty-first century, Congress has once again entered the discussion about the original purpose of diversity jurisdiction—this time, through the Class Action Fairness Act of 2005 (CAFA).⁶³ In CAFA, the original and removal jurisdiction of the federal courts was significantly expanded with regard to certain class actions. This result was achieved primarily through a provision that required these class actions to meet a requirement only of minimum diversity (as opposed to the complete diversity requirement that has been required of most diversity controversies since the Judiciary Act of 1789).⁶⁴ In the “Findings and Purposes” section of CAFA, Congress explicitly justified

58. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 298 (5th ed. 2007).

59. AM. LAW INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 106 (1996).

60. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 216 (1996); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) [hereinafter *Myth of Parity*]; Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995).

61. See, e.g., 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 443–45 (3d ed. Little, Brown & Co. 1858); *Myth of Parity*, *supra* note 60.

62. See Frank, *supra* note 40, at 27; Moore & Weckstein, *supra* note 40 at 21–24.

63. *Id.* at § 4(a).

64. Pub. L. No. 109-2, 119 Stat. 4 (2005).

this jurisdictional expansion as a return to “the concept of diversity jurisdiction as intended by the framers of the United States Constitution,” and it declared that one purpose of the Act was to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”⁶⁵ It additionally cited the purposes of preventing bias against out-of-state litigants and of preventing states from imposing their laws upon other states.⁶⁶ As such, CAFA articulated a relatively broad vision of the Diversity Clauses, and it signaled a clear move away from Congress’s earlier antagonism toward diversity jurisdiction.⁶⁷

Despite the various theories advanced regarding its original purpose over the past century, however, the basic contours of this discussion have remained remarkably constant. Most lawyers and scholars continue to presume that the original purpose of federal diversity jurisdiction was to allow out-of-state litigants to avoid the local bias that might await them in state courts. In the words of a recent article: “The generally accepted reason for diversity jurisdiction in the Constitution is fear that state courts would unduly favor local citizens, whereas federal courts . . . would be less inclined to be biased in favor of local citizens.”⁶⁸

III. DIVERSITY JURISDICTION AND NATIONAL HARMONY

As many scholars have observed, the final text of the Diversity Clauses resulted from an attempt by the Committee of Detail to give specificity to a jurisdictional principle approved by the Convention: the principle that federal court jurisdiction should extend to controversies that “involve the National peace and harmony.”⁶⁹ It was a ref-

65. *Id.* at § 2.

66. *Id.*

67. For the argument that CAFA is unconstitutional because it untethers diversity jurisdiction from concerns about state court bias, see C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613 (2004).

68. Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 999 (2012). Other articles from the past few years similarly describe the desire to prevent state court bias against out-of-state individuals as “the goal generally thought to be advanced by maintenance of diversity jurisdiction.” Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 537 n.115 (2012), and as the “purpose of the diversity requirement,” Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 990 (2011).

69. 2 FARRAND’S RECORDS, *supra* note 3, at 39 (Journal, July 18, 1787). For scholars who have noted that the Diversity Clauses grew out of Madison’s phrase “National peace and harmony,” see, for example, AMAR, *supra* note 13, at 578 n.50; Bassett, *supra* note 32; Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79 (1993); David E. Engdahl, *Intrinsic Limits of Congress’ Power Regard-*

erence to “National peace and harmony”—not any verbiage regarding controversies “between Citizens of different States”—that was contained in the draft, introduced by Madison, that the Convention ultimately approved and sent to the Committee of Detail on July 18, 1787.⁷⁰ Moreover, it was this principle (and these exact words) that had been in drafts of Article III since the Convention had taken up Madison’s Virginia Plan early in the summer of 1787, and that had repeatedly been approved by the Convention throughout that summer.⁷¹

In the Committee of Detail, responsibility for drafting the Diversity Clauses fell primarily to Edmund Randolph. Earlier at the Convention, Randolph had explained that the Convention would “establish the principle” of federal court jurisdiction and that it would be “the business of a sub-committee to detail [this principle].”⁷² How did Randolph understand the principle, then, that the Convention had

ing the Judicial Branch, 1999 B.Y.U. L. REV. 75, 149 (1999); Frank, *supra* note 40, at 11; Alex Glashausser, *The Extension Clause and the Supreme Court’s Jurisdictional Independence*, 53 B.C. L. REV. 1225, 1298 (2012); Goldberg-Ambrose, *supra* note 39; Levy, *supra* note 40; Moore & Weckstein, *supra* note 40; Segall, *supra* note 39. For an example of an important earlier scholar who was more skeptical that the references to national “harmony” were attempting to establish diversity jurisdiction, see Friendly, *supra* note 35, at 485–86 (“To be sure, it hardly seems that a dispute between a New Yorker and a Rhode Islander on a five hundred dollar note would, even in 1787, be a question involving ‘the National peace and harmony’ [I]t seems . . . that the authors of the plan were not sure of the details and wished time for consideration.”).

70. 2 FARRAND’S RECORDS, *supra* note 3, at 39 (Journal, July 18, 1787).

71. This phrase had first been introduced to the Convention in Resolution Nine of Madison’s Virginia Plan, which declared that the federal judicial power would extend to “cases in which foreigners or citizens of other States applying to such jurisdictions may be interested . . . [and to] questions which may involve the national peace and harmony.” 1 FARRAND’S RECORDS, *supra* note 3, at 22 (Madison’s Notes, May 29, 1787) (Resolutions proposed by Edmund Randolph). In keeping with the redundant drafting practice that Jack Balkin has observed elsewhere in the Virginia Plan, the Virginia Plan also provided jurisdiction in cases in which “citizens of other States applying to such jurisdictions may be interested.” *Id.*; See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 12 (2010). The language of the Virginia Plan’s jurisdictional grant would be amended when Edmund Randolph successfully moved, with a second from Madison, to amend the grant of diversity jurisdiction to remove this redundancy and read in its entirety: “That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national “revenue, impeachments of any national officers, and questions which involve the national peace and harmony.” 1 FARRAND’S RECORDS, *supra* note 3, at 223–24 (Journal, June 13, 1787). Finally, on July 18, 1787, Madison would introduce the draft that the Convention would send to the Committee of Detail, which simply stated: “That the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony.” 2 FARRAND’S RECORDS, *supra* note 3, at 39 (Record, July 18, 1787).

72. 1 FARRAND’S RECORDS, *supra* note 3, at 238 (Yates’s Notes, June 13, 1787) (Statement of Edmund Randolph).

entrusted to him? According to Yates’s notes, Randolph believed the Convention had approved this principle: that it was the duty of the federal courts “to preserve the harmony of states and that of the citizens thereof.”⁷³ Early drafts produced by Randolph for the Committee of Detail, moreover, confirm that Randolph did indeed understand himself to be elaborating upon this basic principle during his time drafting the Diversity Clauses.⁷⁴

Similarly, when it came time to explain the nature of the Diversity Clauses to the public in *The Federalist Papers*, both Madison and Hamilton would present these clauses as designed to address situations that involved national “harmony.” For Madison, diversity jurisdiction was one of the “powers of the judicial department” that provided for the “harmony and proper intercourse among the States.”⁷⁵ Hamilton similarly would explain in *Federalist 80* that diversity jurisdiction was designed to address “practices [that] may have a tendency to disturb the harmony between the States.”⁷⁶

Early drafts of the Constitution, statements made by drafters at the Constitutional Convention, and statements in *The Federalist Papers* all overlap, therefore, to suggest that diversity jurisdiction emerged from a basic belief that the federal courts should have jurisdiction over controversies involving national “harmony.”⁷⁷ But what did it mean for a federal power to be committed to maintaining national “harmony”?

73. *Id.*

74. As evidence that the Diversity Clauses were an attempt to provide specificity to the phrase “National peace and harmony,” scholars have consistently pointed to an early draft of these Clauses that Edmund Randolph and John Rutledge produced for the Committee of Detail. That draft stated:

7. The jurisdiction of the supreme tribunal shall extend
 1. to all cases, arising under laws passed by the general <Legislature>
 2. to impeachments of officers, and,
 3. to such other cases, as the national legislature may assign, as involving the national peace and harmony,
 - in the collection of the revenue
 - in disputes between citizens of different states
 - <in disputes between a State & a Citizen or Citizens of another State>
 - in disputes between different states; and
 - in disputes, in which subjects or citizens of other countries are concerned
 - <& in Cases of Admiralty Jurisdn>

2 FARRAND’S RECORDS, *supra* note 3, at 146–47 (Committee of Detail).

75. THE FEDERALIST NO. 42, *supra* note 15, at 235 (James Madison).

76. THE FEDERALIST NO. 80, *supra* note 15, at 445–46 (Alexander Hamilton).

77. For additional statements at the Convention, see, for example, 1 FARRAND’S RECORDS, *supra* note 3, at 252 (Madison’s Notes, June 16, 1787) (James Wilson explaining that “jurisdiction is to extend to all cases affecting the Natl. peace & harmony”).

A. "Harmony" in the Age of the Enlightenment

The primary definition of "harmony" in the 1780s did not specifically relate to musical harmony, as it does today.⁷⁸ Similarly, the primary definition did not contain any reference to emotional content that is calming or pleasing. In Samuel Johnson's 1785 dictionary, these meanings were relegated to secondary definitions, while the primary definition of "harmony" was simply: "The just adaptation of one part to another."⁷⁹ Johnson's definition is therefore somewhat different from our current understanding of the term "harmony"—and his definition is hardly self-explanatory. In order to understand this eighteenth-century definition, it is necessary to place it in the context of the scientific rhetoric of the eighteenth century—rhetoric that had its roots in ancient Greece, and that had become ascendant by the time of the Enlightenment.

Since the time of Pythagoras, the relations between the planets had been studied and described as producing a kind of "harmony."⁸⁰ The scientific use of this term was itself borrowed from the rhetoric of music; for Pythagoras and others, the term "harmony" provided a way to express the idea that musical harmony and planetary motion might be two expressions of a common, underlying set of discoverable mathematical ratios. Pointing to this Pythagorean idea, Plato would say in *The Republic*: "[A]s the eyes are fixed on astronomy, so the ears are fixed on harmonic movement, and these two kinds of knowledge are in a way akin, as the Pythagoreans say"⁸¹ This Pythagorean idea would be continually repeated in various forms in the subsequent centuries, and it would survive intact into the eighteenth century.⁸² Closer to the Founders' lifetimes, for example, Kepler's *Harmonices Mundi* would continue to describe the interactions among the planets as creating a kind of "harmony" that was directly connected to that of the musical world.⁸³

Between Kepler's publication of *Harmonices Mundi* and the drafting of the Constitution, Newton would publish his *Philosophiæ Naturalis Principia Mathematica*, and a Newtonian conception of the

78. See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1998) (defining "harmony" primarily as "the combination of simultaneous musical notes in a chord").

79. SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. Rivington, et al. 6th ed. 1785).

80. See JOSCELYN GODWIN, HARMONIES OF HEAVEN AND EARTH: MYSTICISM IN MUSIC FROM ANTIQUITY TO THE AVANT GARDE 113 (1987).

81. PLATO, THE REPUBLIC OF PLATO 201 (530 c) (Allan Bloom ed. & trans., 2d ed. 1991).

82. See JOSCELYN GODWIN, A SOURCEBOOK OF THE HARMONY OF THE SPHERES: THE PYTHAGOREAN TRADITION IN MUSIC (1992).

83. See JOHANNES KEPLER, THE HARMONY OF THE WORLD (E.J. Aiton, A.M. Duncan, & J.V. Field trans., American Philosophical Society 1997) (1618).

universe would sweep across the enlightened world.⁸⁴ As this Newtonian vision became popularized, a new metaphor often was used to describe the planetary system (and to describe the workings of virtually every part of the physical universe). Rather than describing the planets as musical, many now came to describe them as mechanical.⁸⁵ The solar system was viewed as analogous to a great machine, operating smoothly through the coordinated functioning of the many planetary bodies that constituted it.⁸⁶ And although the direct comparison to musical harmony receded, the term "harmony" continued to be employed as a way to express, more generally, the Newtonian understanding of a universe in which seemingly discrete physical bodies remained in continuous, measurable interaction with one another. It was the case, therefore, that Roger Cotes—Newton's collaborator—could pronounce in his preface to the second edition of the *Principia* that Newton had explained the "System of the World" in a manner that revealed "the harmony in it."⁸⁷ And it also was the case that Western thinkers more broadly began to use the term "harmony" within mechanical metaphors that, whether explaining the solar system or some other aspect of the universe, sought to emphasize the machine-like interactions occurring between otherwise discrete parts or components of a larger system. Hence, for example, David Hume could write:

Like many subordinate Artists, employ'd to form the Several Wheels and Springs of a Machine: Such are those who excel in all the particular Arts of Life. He is the Master Workman who puts those several parts together, moves them *according to just Harmony and Proportion*, and produces true Felicity as the result of their conspiring Order.⁸⁸

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84. As one scholar has put it: "The Newtonian revolution differs from those other revolutions (actual or alleged) in science and in mathematics . . . in that Newton was said in his own lifetime to have created a revolution. He was recognized by his contemporaries for . . . a revolution in the science of mechanics created by his *Philosophiæ Naturalis Principia Mathematica*." I. BERNARD COHEN, *REVOLUTION IN SCIENCE* 161 (1985).
85. This is not to say that Newton specifically rejected the notion of the harmony of the spheres as it had been presented by earlier philosophers. For Newton's relationship to this notion, see GODWIN, *supra* note 82, at 305–08. It is to say, however, that he ushered in a new paradigm, and that the term "harmony" was carried over and obtained a new usage amongst those who popularized and drew upon this paradigm, particularly political scientists.
86. See, e.g., MICHAEL KRAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986); MICHAEL FOLEY, *LAWS, MEN AND MACHINES: MODERN AMERICAN GOVERNMENT AND THE APPEAL OF NEWTONIAN MECHANICS* (1990); Note, *Organic and Mechanical Metaphors in Late Eighteenth-Century American Political Thought*, 110 HARV. L. REV. 1832 (1997).
87. SIR ISAAC NEWTON, *MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY AND HIS SYSTEM OF THE WORLD* xxxii (Andrew Motte & Florian Cajori trans., 1934) (1713).
88. 1 DAVID HUME, *The Stoic*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 203, 206 (T.H. Green & T.H. Gross eds., 1898) (1742) (emphasis added).

It was this Newtonian perspective, with its vision of a mechanical universe comprised of discrete and constantly-interacting parts, that gave meaning and content to Samuel Johnson's definition of the term "harmony" as the "just adaptation of one part to another."⁸⁹ It was a definition that presumed the existence of several distinct "parts" within a larger system—and that looked past the internal workings of those "parts" in order to focus attention squarely upon the forces or activities that extended between them, connecting them in a larger system.

The Founders who attended the Constitutional Convention were particularly inclined to incorporate this Newtonian definition of "harmony" into their vocabularies. Many of the Founders rightly regarded themselves not merely as politicians, but as political scientists—and in the eighteenth century, political science often employed scientific metaphors to explain its vision of government. As historian I. Bernard Cohen observes: "Examples abound in eighteenth-century political discussions in which the use of a scientifically based metaphor implies that some of the value system of the sciences is being shared by political or social science."⁹⁰ This trend was present in full force in colonial America.⁹¹

Moreover, the Founders already were accustomed to comparing the interactions between sovereign entities to the relations of the planets. In *Common Sense*, for example, Thomas Paine observed:

[T]here is something very absurd, in supposing a continent to be perpetually governed by an island. In no instance hath nature made the satellite larger than its primary planet, and as England and America, with respect to each other, reverses the common order of nature, it is evident they belong to different systems: England to Europe; America to itself.⁹²

Eleven years later, Publius would return to this planetary analogy to describe the proper relations between the several states. Describing recent advancements in "the science of politics" in *Federalist 9*, Publius said these advancements illustrated "the ENLARGMENT of the ORBIT within which such systems [of government] are [able] to revolve, either in respect to the dimensions of a single State or to the consolidation of several smaller States into one great Confederacy."⁹³ Publius would use this analogy again in *Federalist 18*.⁹⁴ Clearly, this

89. Johnson, *supra* note 79.

90. I. BERNARD COHEN, *SCIENCE AND THE FOUNDING FATHERS: SCIENCE IN THE POLITICAL THOUGHT OF JEFFERSON, FRANKLIN, ADAMS AND MADISON* 36 (1995).

91. For recent scholarship on this rhetorical tendency among the Founders, see COHEN, *supra* note 90; KRAMMEN, *supra* note 86; FOLEY, *supra* note 86; Note, *supra* note 86.

92. THOMAS PAINE, *COMMON SENSE* 90–91 (Isaac Kramnick ed., Penguin Books 1976) (1776).

93. THE FEDERALIST NO. 9, *supra* note 15, at 40–41 (Alexander Hamilton).

94. THE FEDERALIST NO. 18, *supra* note 15, at 88–92 (James Madison & Alexander Hamilton) ("The smaller members [of the Grecian republics], though entitled by

planetary metaphor continued to play a significant role in the minds of the founding generation as the Constitution took its shape.

At the Constitutional Convention, several delegates made use of this analogy to the planetary system—and, in so doing, they revealed an awareness of the Newtonian context that shaped the term “harmony.” John Dickinson, for example, would defend his preference for allowing state legislatures to elect Senators by saying: “a government thus established would *harmonize the whole*, and like the planetary system, the national council like the sun, would illuminate the whole—the planets revolving round it in perfect order.”⁹⁵ Similarly, when describing his desire for Congress to have the power to veto state legislative acts, James Madison would tell the Convention:

In a word, to recur to the illustrations borrowed from the planetary System, This prerogative of the General Govt. is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy *the order & harmony of the political system*.⁹⁶

For Madison and Dickinson, the terms “harmony” and “harmonize” crystallized a larger analogy to the “planetary system.” It was an analogy that presumed the existence of certain “planets” or parts within the American political system. Additionally, it presented the diligent political scientist as one who studied the interactions occurring between and across these sovereign “planets”—interactions that defined the “harmony” of the political system.

The delegates to the Convention did not always speak in planetary analogies, of course, nor was it necessary for them to do so. In *Federalist* 82, Publius illustrates the ease with which this Newtonian definition of “harmony” could be abstracted from the planetary analogy. Here, Publius explains that the delegates were working toward the goal of establishing a “compound . . . system” in America.⁹⁷ As Samuel Johnson’s 1785 dictionary explains, the term “compound” described something that was “formed out of many ingredients” or that was “form[ed] by uniting various parts.”⁹⁸ Much like the planetary systems discussed by Dickinson and Madison, this reference to a “com-

the theory of their system to revolve in equal pride and majesty around the common center, had become, in fact, satellites of the orbs of primary magnitude.”).

95. 1 FARRAND’S RECORDS, *supra* note 3, at 157 (Yates’s Notes, June 7, 1787) (statement of John Dickinson) (emphasis added).

96. *Id.* at 165 (Madison’s Notes, June 8, 1787) (Statement of James Madison) (emphasis added). Notably, the statement by Madison was made eight days before he would introduce the draft of the Diversity Clauses that the Convention would approve and send to the Committee of Detail.

97. THE FEDERALIST NO. 82, *supra* note 15, at 459 (Alexander Hamilton).

98. Johnson’s dictionary defines the adjectival term “compound” as “formed out of many ingredients,” and it explains that this adjectival use was derived from the verb form of “compound,” which was defined, in part, as: “To form by uniting various parts.” Johnson, *supra* note 79.

pound” system therefore suggested that, under the Constitution, America would be a nation comprised of several distinct “parts.” How, then, would these distinct parts interact to form a larger system? The passage of time, Publius explains, would eventually “adjust [those constituent parts] to each other in a harmonious and consistent WHOLE.”⁹⁹ Through this description, Publius returns to the Newtonian understanding of “harmonious” activity, focusing upon the ways that semi-autonomous parts adjust to, and interact with, each other in a larger system.¹⁰⁰

What were the “parts,” then, that comprised this “compound” system in America? For the Founders, these parts were the individual states. Publius makes this clear when he shifts from the shorthand of the Virginia Plan, which spoke of “National . . . harmony,” to his preferred phrase of “harmony between the States.”¹⁰¹ Just as the Netherlands sought to “secure harmony” among individual “provinces,”¹⁰² as Publius noted, and just as Britain aimed to “maintain the harmony . . . of the various parts of the empire,”¹⁰³ as Madison observed, the Founders focused upon “harmony” as it related to the sovereign states. Not surprisingly, then, the term “harmony” described a wide range of interactions for the Founders, but it almost never described intrastate activity.¹⁰⁴

In *The Federalist Papers*, Publius does not simply speak of “harmony” between the states, however. Instead, he twice describes diversity jurisdiction as a power relating to the “harmony and proper intercourse among the States.”¹⁰⁵ Why would Publius also speak of “intercourse” among the states here? According to Jack Balkin, “intercourse” was a term the Founders specifically used to pair interstate

99. THE FEDERALIST NO. 82, *supra* note 15, at 459 (Alexander Hamilton).

100. *Id.*

101. THE FEDERALIST NO. 80, *supra* note 15, at 445–46 (Alexander Hamilton). *See also* THE FEDERALIST NO. 41, *supra* note 15, at 224 (James Madison) (describing government powers that might provide for “harmony . . . among the States”); THE FEDERALIST NO. 42, *supra* note 15, (James Madison) (speaking of “harmony . . . among the States”). For a scholar who perceives a similar scope to the term “National peace and harmony,” albeit while discussing this phrase in the context of federal question jurisdiction, see Segall, *supra* note 39, at 367–68.

102. THE FEDERALIST NO. 20, *supra* note 15, at 103 (James Madison & Alexander Hamilton).

103. 2 FARRAND’S RECORDS, *supra* note 3, at 28 (Madison’s Notes, July 17, 1787) (Statement of James Madison).

104. In *The Federalist Papers*, for example, the terms “harmony,” “harmonize,” and “harmonious” are collectively used a total of twelve times, and in eleven of these instances, these terms clearly refer to interactions between different governmental bodies or between different political communities. *See* THE FEDERALIST PAPERS, *supra* note 15.

105. THE FEDERALIST NO. 42, *supra* note 15, at 235 (James Madison); THE FEDERALIST NO. 42, *supra* note 15, at 269 (James Madison); THE FEDERALIST NO. 41, *supra* note 15, at 224 (James Madison).

problems with grants of federal power.¹⁰⁶ This definition of “intercourse” overlaps remarkably well with the Newtonian understanding of “harmony” between the states. It is possible, of course, that this definitional overlap is coincidence. Yet this convergence of definitions creates the possibility that Publius was using the phrase “harmony and proper intercourse” not to refer to two distinct, separate concepts, but rather as a single descriptive phrase—a phrase suggesting that the harmony-based powers were an attempt to provide federal oversight of interstate matters.¹⁰⁷

The term “harmony” therefore already had a long history within the rhetoric of physics and astronomy when the Founders employed it at the Convention. By the eighteenth century, this rhetorical tradition had evolved such that the term “harmony” commonly was used to describe the interactions that were observed to be occurring between and across the different planets that coexisted within a larger solar system. Borrowing from this rhetorical tradition, it seems, the Founders used the phrase “harmony . . . among the States” as a way to refer to those interstate interactions that occurred between and across the different states that coexisted within America’s political system. Understood as such, the Founders’ many references to national “harmony” become references to those items that, much like the vectors of gravitational force that extended between independent planets, were observed to extend across several states. As Justice Black would put it in *United States v. South-Eastern Underwriters Ass’n*:

[When a power] is declared in The Federalist to be for the purpose of securing the “maintenance of harmony and proper intercourse among the States” [It should be viewed as a power] concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.¹⁰⁸

B. “Interests” in a Harmonious System

What, then, were the Newtonian forces that connected the states into a national system? According to the Founders, this function was served primarily by the “interests” that ran throughout the nation. As Publius explained, these interests were of particular importance to political scientists since: “The regulation of these various and interfering

106. Balkin, *supra* note 71, at 15–16.

107. For a competing interpretation that attempts to emphasize Madison’s pairing of the term “harmony” with the term “peace” (rather than its pairing with the term “intercourse”), and that consequently argues that diversity jurisdiction was focused on the narrower purpose of avoiding war, see, for example, Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1288 (1996); Collins, *supra* note 37, at 672.

108. 322 U.S. 533, 551–52 (quoting THE FEDERALIST NO. 41 (James Madison)).

interests forms the principal task of modern legislation.”¹⁰⁹ A host of these interests already existed in America. As Publius observed: “A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations”—and America, he noted, was no exception.¹¹⁰

In some respects, this Founding-era vision of government’s connection to “interests” dated back at least to the Renaissance.¹¹¹ The idea that interests could be territorially mapped, and that the existence of these interests had implications for the proper structure of government, for example, has been traced back to that period.¹¹² For Renaissance thinkers, however, the political community often was viewed as sharing a single interest; in the words of one scholar, “A community in general was thought to be a unified entity with a common purpose.”¹¹³ With the shift to an Enlightenment paradigm, by contrast, it also became possible to conceive of the members of a community as rational market actors each pursuing his or her private self-interest.¹¹⁴ This, in turn, opened up to the Founders a sort of sociology: they could study and demarcate “interests” that populated the nation, and they could debate how political entities ought to map onto these interests.

When the Founders engaged in this sociological activity, they discovered that the interests residing in the several states were constantly merging, colliding, conflicting, and otherwise “interfering” with each other.¹¹⁵ Like other forces, these collisions could be attractive or repulsive; shared interests might bring different communities together,¹¹⁶ while opposing interests could push them apart.¹¹⁷ In ei-

109. THE FEDERALIST NO. 10, *supra* note 15, at 47 (James Madison).

110. *Id.*

111. ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 130–31 (1986).

112. *Id.*

113. *Id.* at 130.

114. *See id.* at 147–48. For Sack’s views on the competing visions among the Founders of the proper relationship between territorially-conceived “interests” and electoral representation, *see id.* at 144–53.

115. *See* THE FEDERALIST NO. 10, *supra* note 15, at 47 (James Madison).

116. *See, e.g.,* THE FEDERALIST NO. 6, *supra* note 15, at 24 (Alexander Hamilton) (“Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest . . .”); THE FEDERALIST NO. 14, *supra* note 15, at 67 (James Madison) (“We have seen the necessity of the Union . . . as the guardian of our commerce and other common interests . . .”); THE FEDERALIST NO. 4, *supra* note 15, at 17 (John Jay) (“[O]ne government, watching over the general and common interests . . .”); THE FEDERALIST NO. 15, *supra* note 15, at 78 (Alexander Hamilton) (referring to “a sense of common interest”); *id.* at 79 (describing the country “uniting in a common interest”).

117. *See, e.g.,* 3 FARRAND’S RECORDS, *supra* note 3, at 138 (Appendix A, CXLII) (describing James Wilson in the Pennsylvania Convention as discussing the de-

ther instance, the lesson was the same: the “harmony” of the nation was implicated, and so the collision ought to receive federal oversight.

Each of these harmony-related forces—the attractive force of shared interests, and the repulsive force of opposed interests—warrants additional attention. Consider, for example, instances in which a shared interest extended across several states. The idea that this situation implicated national “harmony” was not an innovation of the Convention; it repeatedly was heard in the Continental Congress, for example, such as when Theodorick Bland would speak of the “harmony of these States, so happily united in one great political interest.”¹¹⁸ This idea was carried over into the Constitutional Convention. As Roger Sherman said at the Convention, when two political entities retain “separate and distinct jurisdictions” but nonetheless share a “mutual interest,” this creates “a due harmony between the two Governments.”¹¹⁹ Similarly, Edmund Randolph would observe to the Convention that its Article I provision regarding the “general interests of the Union” was redundant with the provision relating to national “harmony.”¹²⁰

Meanwhile, the Founders viewed the term “harmony” as equally applicable to situations marked by the collision of opposing interests. When interests within two distinct jurisdictions clashed with regard to an issue, as James Wilson observed to the Convention, it was understood to be “*unfavorable to the Harmony of the Nation*.”¹²¹ Edmund Randolph would make the same point to the Convention in his discussion of the need for a commerce power, as he emphasized that the divergent commercial interests found in the separate states implicated national “harmony.”¹²²

sign of the Constitution “to combat and reconcile the jarring interests” in the country); *id.* at 301 (Charles Pickney, Letter in State Gazette of South Carolina) (describing the Constitution as a success despite having “so many jarring interests and prejudices to reconcile!”).

118. 24 FARRAND’S RECORDS, *supra* note 3, at 384. *See also* 5 DEBATES, *supra* note 3, at 102 (“[G]uard against a rupture of the subsisting harmony, and promote the mutual interest of the two nations.”); 26 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 184 (Worthington Chauncey Ford ed., 2005) (statement by John Francis Mercer) (“[T]he harmony of the Union will be best promoted by . . . obtaining the concurrence of the respective parts in its most important interests.”).
119. 1 FARRAND’S RECORDS, *supra* note 3, at 150 (Madison’s Notes, June 7, 1787) (statement of Roger Sherman).
120. 2 FARRAND’S RECORDS, *supra* note 3, at 26 (Madison’s Notes, July 17, 1787) (Motion of Gunning Bedford, Jr.).
121. 1 FARRAND’S RECORDS, *supra* note 3, at 158 (King’s Notes, June 7, 1787) (statement of James Wilson) (emphasis added).
122. 1 FARRAND’S RECORDS, *supra* note 3, at 273 (Paterson’s Notes, June 16, 1787) (statement of Edmund Randolph) (stating that there was “No Provision under the Confedn. for supporting the Harmony of the States—their commercial Interests different”).

This use of the term “harmony”—a use that presumes “harmony” to be implicated when distinct communities find their interests commingling, whether in alignment or in opposition—is contrary to a common presumption regarding the Founders’ use of this term. According to many, the Founders spoke of national “harmony” simply to refer to the absence of armed conflict between the states.¹²³ For the Founders, however, the threat of armed conflict was not an utterly unique situation that warranted a special rule regarding federal power. Rather, this threat was perceived merely as one end of a spectrum of situations in which the interests of distinct communities “interfered” and interacted with one another. Overlapping interests could range from being completely aligned to being squarely opposed—and the threat of armed conflict arose from those situations in which, as Gouverneur Morris put it during the war for Independence, “the interests of [two communities] were directly opposed to each other.”¹²⁴ Consequently, with respect to a situation in which “foreign mercenaries [sent by Great Britain were] coming to destroy [the Americans],” delegates to the Continental Congress also could state that: “[A proposed] measure [is] the best *to procure harmony* with Great Britain. There are now two governments *in direct opposition to each other*.”¹²⁵ Situations of armed conflict clearly implicated national “harmony”—but they did so because war was a manifestation of the fact that two communities had entangled, diametrically opposed interests, not because “harmony” simply referred to the avoidance of armed conflict.

The Founders also were clear at the Convention that both forms of overlapping, multistate interests (i.e., shared interests and opposed interests) were the proper objects of federal governance. With regard

123. For studies that have interpreted the term in this manner, see *supra* note 38.

124. Morris described the outbreak of the Revolution, saying:

At the same time it was a decided fact, that the *interests* of England and of America *were directly opposed to each other*. It was your interest to restrict our commerce, and it was our interest to extend it: It was your interest to take our money, and it was our interest to keep it. In a word, it was your interest to tyrannize, and it was our interest to be free. We therefore could not trust you, and you would not trust us. The King and his Ministers no body would trust. So that a re-union became every day more problematical.

The great fleets and armies you had employed, and the pains you had taken to deprive us of all military stores, obliged us to seek foreign aid, and it was clear that no Prince would assist us while we acknowledged ourselves to be rebels. Thus it was certain that we should experience the horrors of war, notwithstanding we had offered a part of our rights to avoid them.

Letter from Gouverneur Morris to the Earl of Carlisle (Sept. 19, 1778), in 10 LETTERS OF DELEGATES TO CONGRESS, 1774–1789 668, 672 (Smith, Paul H., et al., eds. 2000) (emphasis added).

125. 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 118, at 1075 (emphasis added).

to shared interests, for example, Publius explained that the federal government would serve as the “depository of the NATIONAL INTERESTS” that resulted when interests in several states aligned around a particular matter.¹²⁶ The draft of Article I that was sent to the Committee of Detail reflected this idea, as it continued to provide for the federal legislature to oversee the “general interests of the Union.”¹²⁷ Hamilton had outlined this approach several years before:

If the States had *distinct interests*, were unconnected with each other, their own governments would then be the proper, and could be the only, depositories of such a power;” he said; “but [insofar] as they are parts of a whole, with a *common interest* in trade, as in other things, there ought to be a common direction in that as in all other matters.¹²⁸

Under the Constitution, as Publius put it: “aggregate interests [would be] referred to the national, the local and particular to the State legislatures.”¹²⁹

As Wilson would later explain at the Pennsylvania ratifying convention, the management of clashing interests similarly was a proper object of federal governance:

[One task of the federal government is] to combat and reconcile the jarring interests that seemed naturally to prevail, in a country which . . . is composed of 13 distinct and independent States, varying essentially in their situation and dimensions, and in the number and habits of their citizens—their interests too, in some respects really different . . .¹³⁰

For the Founders, in other words, the constitutionally significant question was whether the tangle of interests around any single issue extended across the “separate and distinct jurisdictions” of multiple states. Matters that gave rise to entangled interests across multiple

126. THE FEDERALIST NO. 23, *supra* note 15, at 124 (Alexander Hamilton).

127. 2 FARRAND’S RECORDS, *supra* note 3, at 26 (Madison’s Notes, July 17, 1787) (Motion of Gunning Bedford, Jr.).

128. 1 ALEXANDER HAMILTON, *Continentalist* V, (April 18, 1782), in THE WORKS OF ALEXANDER HAMILTON 267, 271 (Henry Cabot Lodge ed., 1904).

129. THE FEDERALIST NO. 10, *supra* note 15, at 51 (James Madison).

130. 3 FARRAND’S RECORDS, *supra* note 3, at 138 (Appendix A, CXLII) (James Wilson in the Pennsylvania Convention). *See also id.* at 341 (Appendix A, CCXXV) (William Richardson Davie speech at the North Carolina ratifying convention); 1 FARRAND’S RECORDS, *supra* note 3, at 273 (Paterson’s Notes, June 16, 1787) (statement by Edmund Randolph) (“The Variety of Interests in the several States require a national Legislation . . .”). According to a footnote in *Farrand’s Records* regarding Paterson’s notes on the statement by Edmund Randolph: “A hand drawn on the margin points to [the reference to “The Variety of Interests” within the above-quoted sentence], as if indicating its importance”. *Id.* For a historically significant later use of the term “harmony” that connects the term to the management of conflicting “interests” in remarkably similar language to that of Wilson, see Henry Clay, *Answer of Objections to the Report of the Committee of Thirteen* (May 21, 1850), in 6 THE LIFE, CORRESPONDENCE, AND SPEECHES OF HENRY CLAY 459 (Calvin Colton ed., 1857) (“[I]t is the duty of all who assail this compromise, to give us their own and a better project; to tell us how they would reconcile the interests of this country, and harmonize its distracted parts.”).

states implicated national “harmony” and would be assigned to the federal government—whether those interests harmonized into a “national interest” or clashed as “jarring interests.” By contrast, the federal government would not govern those matters that only involved interests internal to a single state. Publius would describe these as “local circumstances and lesser interests” that did not warrant federal attention.¹³¹

Not surprisingly, therefore, the records of the Constitutional Convention reveal extended debates about whether specific matters—such as slavery¹³² or commerce¹³³—truly did involve national “harmony” by giving rise to entangled interests across several states. Similarly, *The Federalist Papers* offered proofs that interests in particular matters truly did reach across several states—attempting to show, for example, that interest in a common defense reached “from Maine to Georgia,”¹³⁴ and that the necessity for a navy was best understood as a single, shared interest that extended from “the Northern hive” to “the Middle States” to the “more southern States.”¹³⁵ Founders similarly wrote letters emphasizing that prohibitions on state action in Article I, Section 10 related to matters “in which the interest of foreigners, as well as of the citizens of different states, may be affected.”¹³⁶ It was of constitutional consequence to show that a single matter gave rise to entangled interests across multiple states—and so the Founders repeatedly attempted to make such showings.

In this context, Madison’s provision for diversity jurisdiction in the Virginia Plan is particularly relevant. In addition to providing judicial power over questions involving “National peace and harmony,”

131. THE FEDERALIST NO. 10, *supra* note 15, at 51 (James Madison). See also 2 FARRAND’S RECORDS, *supra* note 3, at 559 (Madison’s Notes, Sept. 10, 1787) (“Mr. Rutledge said he never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it.”) (emphasis added); 3 FARRAND’S RECORDS, *supra* note 3, at 64 (Letter of Alexander Martin to Governor Caswell) (“United America must have one general Interest to be a Nation, at the same time preserving the particular Interest of the Individual States.”).

132. See 2 FARRAND’S RECORDS, *supra* note 3, at 362 (Madison’s Notes, August 21, 1787) (Mason arguing that “the 8 Northern States have an interest different from the five Southn”); *id.* at 364 (recording Rutledge arguing that slavery was a common rather than opposed interest); *id.* at 371 (recording Pickney agreeing that “the importation of slaves would be for the interest of the whole Union”); *id.* at 559 (recording Rutledge later arguing that there were “States not interested in that property” of slaves).

133. *Id.* at 449 (recording Pickney arguing that “there were five distinct commercial interests” in the nation); *id.* at 450–53 (recording Morris, Madison, and Gorham arguing that commerce was a single national interest).

134. THE FEDERALIST NO. 25, *supra* note 15, at 131 (Alexander Hamilton).

135. THE FEDERALIST NO. 11, *supra* note 15, at 57 (Alexander Hamilton).

136. 3 FARRAND’S RECORDS, *supra* note 3, at 100 (Letter of Sherman & Ellsworth to the Governor of Connecticut).

the Virginia Plan also included a federal judicial power over “cases in which foreign[] [parties], or citizens of other States, applying to such jurisdictions *may be interested*.”¹³⁷ In such cases, there inevitably would be interests that extended across state jurisdictional lines, since there would be “interested” parties residing in different states. According to the logic of the Constitutional Convention, this alone warranted an assignment of federal power.

While the reference to “interested” parties would disappear in later drafts of Article III, this disappearance would mean little. The provision for judicial power over questions involving “National peace and harmony” would remain, and the Founders quite clearly understood national harmony to be implicated whenever “mutual interests” or “jarring interests” crossed state lines. In this regard, the deletion of the reference to “interested” parties from other jurisdictions appears to have been little more than the elimination of a redundancy in the Virginia Plan, a refinement similar to those that also were made during the Convention with respect to redundancies in the legislative powers of that Plan.¹³⁸

C. “Harmony” as an Inter-Branch Principle

Once the term “harmony” is placed within its eighteenth-century rhetorical context, therefore, diversity jurisdiction is shown to emerge from a conceptual effort by the Founders to identify matters that would produce entanglements of interests that would spill across state lines. In this regard, the Diversity Clauses appear animated by a principle very similar to that which, according to some scholars, also animates the Commerce Clause (as well as several other Article I powers). Explaining this principle to the Pennsylvania ratifying convention, James Wilson said:

Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.¹³⁹

John Marshall would reiterate this sentiment several years later in *Gibbons v. Ogden*, saying:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with

137. 1 FARRAND’S RECORDS, *supra* note 3, at 21–22 (Madison’s Notes, May 29, 1787) (emphasis added).

138. See Balkin, *supra* note 71, at 12.

139. 2 DEBATES, *supra* note 3, at 424.

which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.¹⁴⁰

Two constitutional scholars have argued that this principle was at the heart of at least one other constitutional provision: the Commerce Clause. Akhil Amar has observed:

Under a broad reading, if a given problem genuinely spilled across state or national lines, Congress could act. Conversely, a problem would not truly be “with” foreign regimes or “among” the states, so long as it remained wholly internal to each affected state, with no spillover. On this view, legal clarity might be advanced if lawyers and judges began referring to these words not as ‘the commerce clause,’ but rather as ‘the international-and-interstate clause’ or the ‘with-and-among clause.’¹⁴¹

Jack Balkin has similarly endorsed an interpretation of “commerce” that includes non-economic activities such as “interactions, exchanges, interrelated activities, and movements back and forth, including, for example, travel, social connection, or conversation.”¹⁴² According to Amar and Balkin, the Commerce Clause was not designed to separate economic activity from non-economic activity. Rather, it was designed to separate wholly intrastate activity from activity that traversed state lines, either in its operations or in its effects.

For both Amar and Balkin, the Founders’ application of this rule was limited to Article I.¹⁴³ In the foregoing statements by James Wilson and John Marshall, by contrast, there is little evidence that this rule was specific to the Article I powers. Wilson speaks of the “objects” of government—a broad term that implies no limitation to the objects of the legislature (and, indeed, Publius repeatedly uses the term “objects” in *The Federalist Papers* in both the Article I and Article III contexts).¹⁴⁴ Similarly, Marshall speaks of the “purposes” that animate “the whole government,” not just one branch of it. It seems possible, therefore, that this was an inter-branch principle of federal power that animated the Diversity Clauses as well as Article I provisions such as the Commerce Clause.

The text of the Virginia Plan corroborates this thesis. Resolution Six of the Virginia Plan included a federal power to legislate in instances “in which *the harmony of the United States* may be inter-

140. *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824).

141. AMAR, *supra* note 13, at 108.

142. Balkin, *supra* note 71, at 15–16.

143. Amar only discusses it in the Commerce Clause context, and Balkin refers to it as the “structural principle [that] underlies all of Congress’s enumerated powers.” AMAR, *supra* note 13; Balkin, *supra* note 71, at 6.

144. In *Federalist* 80, for example, Publius says: “To JUDGE with accuracy of the proper extent of the federal judicature it will be necessary to consider, in the first place, what are its proper objects.” THE FEDERALIST NO. 80, *supra* note 15, at 443 (Alexander Hamilton).

rupted by the exercise of individual Legislation.”¹⁴⁵ This exact phrase would later be approved by the Convention and sent to the Committee of Detail. Meanwhile, as the foregoing pages explained, Resolution Nine of the Virginia Plan stated that the jurisdiction of the federal judiciary would extend to legal controversies that “involve *the national peace and harmony*,” and this language also would be approved and sent to the Committee of Detail.¹⁴⁶ It was only when Articles I and III were rephrased by the Committee of Detail that their parallel references to “harmony” were removed—and the Committee of Detail, it must be recalled, was tasked only with elucidating and expanding upon those statements of principle that had already been approved by the Convention.¹⁴⁷ When we look beyond the verbiage inserted by the Committee of Detail, therefore, what emerges is an underlying vision that unites Article I and Article III in a shared commitment to federal power over those problems and activities that implicate national “harmony.”

Similarly, *The Federalist Papers* explain that powers found in both Article I and Article III were designed to “provide for the harmony and proper intercourse among the States.”¹⁴⁸ In the Article I context, Publius lists several legislative powers that are “comprehended under this [class of federal power],” including the power “to regulate commerce among the several States and the Indian tribes.”¹⁴⁹ He also notes that “particular powers of the federal judiciary” are included within this class of federal power—a clear reference to diversity jurisdiction, since it is diversity jurisdiction that Publius later discusses as involving controversies that “relate to the intercourse . . . between the States themselves”¹⁵⁰ and that “have a tendency to disturb the harmony between the States.”¹⁵¹ *The Federalist Papers* therefore confirm what the text of the Virginia Plan, as well as the statements by Wilson and Marshall, suggests: that the Diversity Clauses were part of a larger effort to implement an inter-branch vision that would extend federal power over matters that involved national “harmony”—or, as James Wilson would put it, over matters that extended “beyond the bounds of a particular state.”

145. 1 FARRAND’S RECORDS, *supra* note 3, at 21 (Madison’s Notes, May 29, 1787) (emphasis added).

146. *Id.* at 21–22 (emphasis added).

147. *See supra* notes 72–74.

148. THE FEDERALIST NO. 42 *supra* note 15, at 282 (James Madison).

149. *Id.*

150. THE FEDERALIST NO. 80, *supra* note 15, at 443–49 (Alexander Hamilton).

151. *Id.* at 537.

IV. HARMONY AND THE BODY POLITIC

The Founders' use of the term "harmony" therefore drew upon a scientific analogy in order to focus upon those interests that, like vectors of gravitational force between planets, extended between and across different states. This was not the only scientific analogy that the Founders would use to communicate their vision of interstate federal powers, however. Publius also would highlight the interstate nature of these harmony-based powers by deploying an American version of a centuries-old metaphor: the metaphor of the nation as a body politic.¹⁵² As David Hale has observed, this metaphor often has been useful to those who wish to portray the political "body" of the nation as composed of distinct parts that are nonetheless interconnected in specific, vital ways.¹⁵³ For Publius, it was a metaphor that reinforced the idea that, in a nation divided geographically into distinct states, federal power should exist over matters that involved interests extending across multiple states.

Publius's discussion of the Article I commerce power provides a good example in this regard. In this discussion, Publius develops the metaphor of the Founders as doctors diagnosing and tending to the ailments that afflict "the great body of the citizens of the United States."¹⁵⁴ Unlike Enlightenment writers such as John Locke, however, Publius did not use this metaphor simply to suggest that a collection of autonomous individuals had entered into a single, unified political community.¹⁵⁵ In America, Publius explains, the national

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152. THE FEDERALIST No. 42, *supra* note 15, at 235 (James Madison). As Harold Aspiz puts it, this metaphor "imply[es] that biological laws [are] applicable to national development." Harold Aspiz, *The Body Politic in Democratic Vistas*, in WALT WHITMAN: THE CENTENNIAL ESSAYS 105, 105 (Ed Folsom ed., 1994). For a history of the body politic metaphor, see ERNST KANTOROWICZ, *THE KING'S TWO BODIES* (1957), and for discussions of its use in Founding-era America, see COHEN, *supra* note 86, at 152–53; JEFFREY STEELE, *TRANSFIGURING AMERICA: MYTH, IDEOLOGY, AND MOURNING IN MARGARET FULLER'S WRITING* 255 (2001); JACQUELYN C. MILLER, *THE BODY POLITIC: PASSIONS, PESTILENCE, AND POLITICAL CULTURE IN THE AGE OF THE AMERICAN REVOLUTION* (1995); JOHN R. HOWE, *LANGUAGE AND POLITICAL MEANING IN REVOLUTIONARY AMERICA* 105–10 (2004). For more on the ways that the body metaphor was used in the founding era to communicate the ideal of smooth operation and management of interstate or multi-sovereign activities, see Note, *supra* note 86.
 153. DAVID HALE, *THE BODY POLITIC: A POLITICAL METAPHOR IN RENAISSANCE ENGLISH LITERATURE* 7–10 (1971).
 154. THE FEDERALIST No. 46, *supra* note 15, at 262 (James Madison). Publius repeatedly makes use of this metaphor in *The Federalist Papers*. This usage reaches its height in *Federalist* 38, where Publius extends the analogy across several paragraphs. See THE FEDERALIST No. 38, *supra* note 15, at 200–07 (James Madison).
 155. See, e.g., JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 13 (C.B. Macpherson ed., 1980) (1690) ("[F]or it is not every compact that puts an end to the state of nature between men, but only this one of agreeing together mutually to enter into

body is constituted by the various limbs and organs of the several states.¹⁵⁶ Like a body comprised of many limbs or “members,” he observed, America consisted of several distinct states that were situated in different locations within this national “body.”¹⁵⁷

What is it, then, that connects these individual “members” into a larger body politic? It is the “veins of commerce” that run throughout the nation, Publius observes.¹⁵⁸ This metaphor—of commerce as a circulatory system that traverses the national body—appears time and again in *The Federalist Papers*.¹⁵⁹ Through this description of commercial activity, Publius develops a vision of commerce as a system that carries its own geography with it—a geography that consistently transgresses sovereign boundaries to extend its “veins” across communities, across states, and across nations. As Part VIII will explain, the Supreme Court would explicitly return to this metaphor in the twentieth century as it sought to reassert the full scope of Congress’s commerce power in *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*¹⁶⁰ In so doing, the Court returned not only to the rhetoric of Publius’s analysis, but also to its underlying substance: the idea that interstate commerce, simply by virtue of its extension across the distinct organs of the American body politic (which is to say, across the states), is properly within the scope and purpose of the Article I commerce power.

one community, and make one body politic”); *id.* at 48 (“Where-ever therefore any number of men are so united into one society And this is done, where-ever any number of men, in the state of nature, enter into society to make one people, one body politic, under one supreme government”).

156. LOCKE, *supra* note 154, at 13, 48. In the words of Publius, the states are the “member[s] of which the body is constituted.” THE FEDERALIST NO. 15, *supra* note 15, at 80 (Alexander Hamilton). This explanation drew upon the primary definition of the term “member” as a term that referred to a limb, organ, or appendage of the human body; in Samuel Johnson’s dictionary from 1785, for example, the primary definition of “member” is: “A limb; a part appendant to the body.” Johnson, *supra* note 79. Consequently, Publius consistently describes the threat of disunion as a threat of “dismemberment.” See, e.g., THE FEDERALIST NO. 1, *supra* note 15, at 5 (Alexander Hamilton); THE FEDERALIST NO. 7, *supra* note 15, at 29 (Alexander Hamilton); THE FEDERALIST NO. 13, *supra* note 15, at 65 (Alexander Hamilton).

157. THE FEDERALIST NO. 15, *supra* note 15, at 80 (Alexander Hamilton).

158. THE FEDERALIST NO. 11, *supra* note 15, at 57 (Alexander Hamilton).

159. See, e.g., *id.* (explaining that these veins of commerce allow for “a free circulation of the commodities of every part”); THE FEDERALIST NO. 12, *supra* note 15, at 59 (Alexander Hamilton) (describing the ways that commerce promotes the “circulation of the precious metals”); *id.* at 74 (describing “money in circulation, and . . . the celerity with which it circulates”); THE FEDERALIST NO. 14, *supra* note 15, at 71 (James Madison) (describing states that “lie at the greatest distance from the heart of the union, and . . . may partake least of the ordinary circulation of its benefits”).

160. 301 U.S. 1, 27 (1937).

Years later, interestingly, John C. Calhoun would deploy this metaphor (when still in his nationalist phase) with regard to another Article I power that Publius describes as involving “harmony and proper intercourse among the States”: the power to establish post offices and post roads.¹⁶¹ As Calhoun put it: “The mail and the press . . . are the nerves of the body politic. By them the slightest impression made on the most remote parts is communicated to the whole system.”¹⁶²

As for Publius, he does not reserve this bodily metaphor solely for his discussion of the Commerce Clause either. He returns to this geographic analogy several times as he attempts to draw lessons from the example provided by the “Germanic empire,” for example. Discussing the concept of dual sovereignty, Publius explains that a problematic situation exists in Germany because its “laws are addressed to sovereigns, [and this] renders the empire a nerveless body, incapable of regulating its own members, insecure against external dangers, and agitated with unceasing fermentations in its own bowels.”¹⁶³

Publius suggests that there was one sense in which the “Germanic empire” was not “nerveless,” however—its Imperial Chamber was effective precisely because it was “invested with authority to decide finally all differences among the members of the Germanic body.”¹⁶⁴ Diversity jurisdiction, Publius then adds, can serve a similar function “among the members of the Union.”¹⁶⁵ As a power to oversee interactions among the “members” of a national “body,” diversity jurisdiction thereby regulates legal controversies that, like a nervous system running throughout a body, extend across its sovereign organs. In this sense, diversity jurisdiction appears extremely similar to a commerce power that regulated the “veins of commerce” that ran among the several states. In each instance, the focus is upon the geographic expansiveness of the matter to be governed, suggesting that it was this expansiveness, first and foremost, that marked it as a matter worthy of federal oversight.

V. CONSTITUTIONAL TEXT: BETWEEN, WITH, AND AMONG

Through a historical study of the concept of “harmony,” the foregoing pages have argued, it is possible to determine the intent that lay beneath parallel grants of power found in Article I and Article III: the desire to give Congress and the federal courts powers to govern activi-

161. THE FEDERALIST NO. 42, *supra* note 15, at 235 (James Madison).

162. John C. Calhoun, Speech of February 4, 1817 to the House of Representatives, in THE EARLY AMERICAN REPUBLIC: A DOCUMENTARY READER 67, 69 (Sean Patrick Adams ed., 2009).

163. THE FEDERALIST NO. 19, *supra* note 15, at 98 (Alexander Hamilton and James Madison).

164. THE FEDERALIST NO. 80, *supra* note 15, at 445 (Alexander Hamilton).

165. *Id.*

ties that would arouse overlapping interests across multiple states. In response to this argument, it might be asked: where do we find this principle in the final text of the Constitution?

The answer to this question can be found, at least in part, in three prepositions that are scattered across Articles I and III: the prepositions *with*, *among*, and *between*. By definition, these three prepositions refer to objects or activities that extend across the space that separates two distinct entities. Not surprisingly, therefore, the Founders might have found these prepositions helpful in their effort to label activities that require federal oversight because they spill across two or more states.

This interpretation runs counter to the common legal presumption that different terms must convey different meanings, however. It certainly is possible, moreover, that the Founders switched between these three prepositions in the Constitution in order to communicate three distinct ideas, not a single underlying vision of federal power over interstate matters. Consequently, we are confronted with two competing interpretations of the prepositions *with*, *between*, and *among*: one which emphasizes their overlapping meanings and asserts the existence of a common, underlying commitment to national “harmony,” and another which emphasizes their differing meanings and argues that these terms do not coalesce into a larger vision of federal power.

It is in situations of ambiguity such as this that *The Federalist Papers* are particularly helpful, since Publius makes an effort throughout *The Federalist Papers* to integrate the vocabulary of the Constitution into his analyses. Publius’s discussion of the Commerce Clause is illuminating, for example. The final text of the Commerce Clause would include a power to regulate commerce “*among* the several States,”¹⁶⁶ and Publius would echo this terminology in *Federalist* 42, describing the Commerce Clause as providing a power “to regulate commerce *among* the several States”¹⁶⁷ and to oversee “intercourse *among* the States.”¹⁶⁸ Alternately, Publius also says in *Federalist* 42 that the commerce power is a power “to regulate the commerce *between* [the nation’s] several members,”¹⁶⁹ a power “to regulate the trade *between* State and State,”¹⁷⁰ and a power to oversee “intercourse

166. U.S. CONST. art. I, § 8, cl. 3. Even the New Jersey Plan for the Constitution, which had contained a relatively narrow vision of federal power, would have created a congressional power to “pass Acts for the regulation of trade & commerce . . . with each other.” 1 FARRAND’S RECORDS, *supra* note 3, at 243 (Madison’s Notes, June 15, 1787).

167. THE FEDERALIST NO. 42, *supra* note 15, at 235 (James Madison) (emphasis added).

168. *Id.* (emphasis added).

169. *Id.* (emphasis added).

170. *Id.* (emphasis added).

between the States.”¹⁷¹ Notably, this interchangeable use of “between” and “among” in *Federalist 42* contrasts with Publius’s usage of the term “with,” both in *Federalist 42* and in other sections of *The Federalist Papers*, Publius tends to use the term “with” to refer to commerce that is international, not interstate, in nature.¹⁷² The discussion of the Commerce Clause in *The Federalist Papers* therefore suggests that the terms “among” and “between”—though perhaps not the term “with”—were synonymous references to a common underlying principle.

Incidentally, the commerce power is not the only congressional power Publius describes as relating to activities that extend “among” or “between” the several states. In *Federalist 42*, no less than ten different powers found in Article I, Section 8 are described as involving intercourse “among the States.”¹⁷³ While the Commerce Clause would be the only Article I, Section 8 power described in the Constitution as governing an activity that is “among the States,” therefore, *The Federalist Papers* make it clear that a broader collection of Article I, Section 8 powers sought to provide federal oversight of activities that spilled across several states. All of these Article I, Section 8 powers also are described by Publius as within the class of powers that “provide for the harmony and proper intercourse among the States.”¹⁷⁴

What about the provisions of the Constitution that relate to national “harmony” and that are found beyond Article I, Section 8? In *Federalist 42*, Publius is clear that the Compact Clause of Article I, Section 10 similarly involves national “harmony.”¹⁷⁵ Not surprisingly, the text of the Compacts Clause refers to each state’s “Compact[s] with another State,”¹⁷⁶ while *Federalist 43* refers to compacts

171. *Id.* See also THE FEDERALIST NO. 11 (Alexander Hamilton), *supra* note 15, at 71; THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 15, at 147 (speaking of “commerce . . . between the States”).

172. THE FEDERALIST NO. 42, *supra* note 15, at 236 (James Madison) (speaking of “[t]he regulation of commerce with the Indian tribes”). See also THE FEDERALIST NO. 3, *supra* note 15, at 11 (John Jay) (referring to America’s “commerce with Portugal, Spain, and Britain”); THE FEDERALIST NO. 5, *supra* note 15, at 20 (John Jay) (describing “commerce with foreigners” that is regulated by treaty); THE FEDERALIST NO. 23, *supra* note 15, at 121 (Alexander Hamilton) (speaking of the “regulation of commerce with other nations and between the States”). In the final text of the Constitution, the term “with” is used in Article I, Section 8 to refer to commerce with foreign nations and with Native American tribes, U.S. CONST. art. I, § 8, cl. 3, and in the Article I, section 10 requirement of congressional approval in order for any state to “enter into any Agreement or Compact with another State, or with a foreign Power,” U.S. CONST. art. I, § 10, cl. 3.

173. See THE FEDERALIST NO. 42, *supra* note 15, at 235 (Alexander Hamilton) (emphasis added).

174. THE FEDERALIST NO. 42, *supra* note 15, at 235 (James Madison).

175. As Publius explains: “Under this head might be included the particular restraints imposed on the authority of the States.” *Id.*

176. U.S. CONST. art. I, § 10 (emphasis added).

“*between* independent sovereigns”¹⁷⁷ and describes the Articles of Confederation as having taken “the solemn form of a compact *among* the States.”¹⁷⁸

In *Federalist* 80, meanwhile, Publius describes diversity jurisdiction as applying to legal controversies that are “between” different states, or that are “between” citizens of different states, no less than nineteen times. One reason for Publius’s repeated use of this preposition is obvious: the term “between” appears five times in Article III, Section 2, and Publius is echoing this constitutional usage. At the same time, however, Publius’s use of the term also echoes the earlier portions of *The Federalist Papers* that described the commerce power, as well as other Article I powers, as focused upon activities that occur “between” multiple states. When Publius describes diversity jurisdiction as granting the federal government: “The power of determining causes *between* two States, *between* one State and the citizens of another, and *between* the citizens of different States,”¹⁷⁹ for example, he clearly is echoing his earlier descriptions of the Commerce Clause as creating a federal government that would engage in “the regulation of commerce . . . *between* the States.”¹⁸⁰ In so doing, Publius provides a suggestion that diversity jurisdiction was to be understood as an extension of the same principle that animated the Article I powers.

Moreover, *Federalist* 80 would interchangeably describe diversity jurisdiction as governing problems that arose “among” several states, presenting diversity jurisdiction as a way to forestall those “bickerings and animosities [that] may spring up *among* the members of the Union”¹⁸¹ and thereby further echoing discussions of Article I powers such as the commerce power.

In Publius’s exposition, therefore, the Diversity Clauses parallel the Commerce Clause (and many other Article I powers) in the sense that each provided a federal power over a matter that occurs “between” and “among” multiple states. The Committee of Detail simply made this clear in the text of the Constitution by replacing the term “harmony” with two synonymous labels that conveyed a common commitment to this overarching idea.

177. THE FEDERALIST NO. 43, *supra* note 15, at 247 (James Madison) (emphasis added).

178. *Id.*

179. THE FEDERALIST NO. 80, *supra* note 15, at 445 (Alexander Hamilton) (emphasis added).

180. THE FEDERALIST NO. 23, *supra* note 15, at 121 (Alexander Hamilton) (emphasis added).

181. THE FEDERALIST NO. 80, *supra* note 15, at 445 (Alexander Hamilton) (emphasis added).

VI. PURPOSE: GEOGRAPHICALLY COMMENSURATE GOVERNMENT

In their explanations of the harmony-based powers, both within the Convention and beyond it, the Founders frequently outlined specific benefits that the nation could expect from the assignment of each of these powers to the federal government. The commerce power would improve the national economy, they argued, and it also would advance national security interests.¹⁸² The power over post offices and post roads would facilitate interstate traffic, and it also would raise revenue.¹⁸³ Diversity jurisdiction would promote peace, and it also would minimize threats of biased adjudication.¹⁸⁴ Each such benefit was specific to an individual provision of the Constitution, however, and so none would actually explain the broader principle from which these constitutional provisions emerged: the principle that the federal government, through a collection of powers, should oversee matters extending across state lines.

In the search for the purpose behind this broader principle, the very phrase “harmony between the States” provides a helpful starting point, as this phrase clearly suggests a focus upon maintaining good relations between the several states.¹⁸⁵ However, this fact alone tells us little. One of the important lessons that emerged from the close study of the concept of national “harmony” in Part III was that the Founders did not view the maintenance of interstate relationships as a distinct activity that could be conducted in isolation from the other tasks of governance. Rather, these interstate relationships were viewed as a byproduct of the natural, already-occurring process whereby the interests and activities of these communities collided and interacted, an idea the Founders expressed by conceptualizing these interests and activities as carrying attractive or repulsive forces that organically connected the states into a complex political system.¹⁸⁶ As such, the maintenance of these interstate relationships was, of necessity, something that occurred almost incidentally through the governance of underlying substantive issues. By governing a substantive issue in which multiple communities had taken an interest, a government thereby would attend to the substance of the relationship between those sovereign communities, thus managing the sinews that connected them into a larger community. The underlying question re-

182. This was because it would lead to the presence of more American sailors and ships, which would facilitate the development of a national navy. *See THE FEDERALIST* No. 11, *supra* note 15, at 57 (Alexander Hamilton).

183. 1 FARRAND'S RECORDS, *supra* note 3, at 205 (Yates's Notes June 11, 1787) (Statement by James Wilson).

184. *THE FEDERALIST* No. 80, *supra* note 15, at 446 (Alexander Hamilton).

185. *THE FEDERALIST* No. 80, *supra* note 15, at 445–46 (Alexander Hamilton).

186. *See supra* notes 109–22 and accompanying text.

garding the harmony-based powers, therefore, was the following: why were the states not trusted to handle this set of underlying substantive issues?

In his analysis of the Commerce Clause in *United States v. South-Eastern Underwriters Ass'n*, Justice Black offered an interpretation of the concept of national "harmony" that attempted to answer these underlying questions.¹⁸⁷ Black argued that the harmony-based powers addressed interstate matters in order to ensure that the federal government could "govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing."¹⁸⁸ The Founders were cognizant of state lines, Black suggested, because the borders of each state marked the territorial limits of many sovereign powers of that state.¹⁸⁹ By focusing upon matters that crossed state lines, the Founders thereby focused on matters that would bring each individual state up against the territorial limits that constrained its ability to act on behalf of its populace.¹⁹⁰ According to Black, a government that was required to work around these territorial limits on its power was unable to meet the Founders' standard of good governance—a standard Black refers to as "fully capable" governance.¹⁹¹ Consequently, Justice Black suggests, the Founders felt that interstate matters needed to be assigned to a government that would not encounter these territorial limits—which is to say, they needed to be assigned to the federal government.¹⁹²

When one turns to the discussions of state boundaries in *The Federalist Papers*, one sees that Justice Black's exclusive focus upon jurisdictional power in *South-East Underwriters Association* is perhaps too narrow. In *The Federalist Papers*, the constraints that state boundaries place upon state governance are shown to take many different forms. Some constraints are indeed jurisdictional, relating to a state's inability to accomplish "the extension of its authority throughout the States."¹⁹³ However, Publius also looks beyond these limits on a state's jurisdictional authority in order to identify a host of *de facto* and *de jure* constraints that prevent a state government from adequately solving interstate problems. Some additional constraints identified by Publius were electoral, arising from the fact that representatives sometimes only feel "deeply interested" in the problems that afflict the geographic "part" of the nation that they represent.¹⁹⁴ Others were psychological, as a representative might be most "sensi-

187. 322 U.S. 533 (1944).

188. *Id.* at 551–52.

189. *Id.* at 552.

190. *Id.*

191. *Id.*

192. *Id.*

193. THE FEDERALIST NO. 23, *supra* note 15, at 123 (Alexander Hamilton).

194. *Id.*

bly impressed" with the need to act upon problems occurring within his or her state simply on account of biases that relate to residence or citizenship within that territorial state.¹⁹⁵

Yet *The Federalist Papers* do support Justice Black's theory that the Convention endorsed a standard of "fully capable" governance that would make this host of territory-related constraints—including jurisdictional constraints—appear to render state governments inadequate to govern interstate matters. According to *The Federalist Papers*, the Convention had embraced the standard that "every power ought to be commensurate with its object."¹⁹⁶ Like many principles of political science in the late eighteenth century, this standard was articulated in quasi-scientific rhetoric (of powers acting upon objects, and of measuring equal proportions of force), an homage to the triumph of Newtonian physics. Behind this rhetoric, however, there was a straightforward idea: a government needs to have powers that are equal to the scale and scope of the problems it is assigned to govern.

According to this standard, a government needs to have more than just the ability to contribute to multi-sovereign solutions. As Publius explains: "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control."¹⁹⁷ Pointing toward the concern about inadequate governance that motivated this standard of "commensurate" government, Publius notes in *Federalist* 23: "Not to confer in each case a degree of power commensurate to the end would be . . . improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success."¹⁹⁸ Publius would refer to this theory of "commensurate" government time and again in *The Federalist Papers*.¹⁹⁹ In so doing, he was clear

195. THE FEDERALIST NO. 23, *supra* note 15, at 123 (Alexander Hamilton).

196. THE FEDERALIST NO. 31, *supra* note 15, at 161 (Alexander Hamilton). Publius refers to this idea as one of the "certain primary truths, or first principles, upon which all subsequent reasonings must depend," *id.*, and as a "fundamental maxim of good sense and sound policy." THE FEDERALIST NO. 30, *supra* note 15, at 158 (Alexander Hamilton).

197. THE FEDERALIST NO. 31, *supra* note 15, at 162 (Alexander Hamilton). *See also* THE FEDERALIST NO. 23, *supra* note 15, at 121–22 (Alexander Hamilton) (claiming that once a power is committed to the federal government, "it will follow that the government ought to be clothed with all the powers requisite to the complete execution of its trust").

198. THE FEDERALIST NO. 23, *supra* note 15, at 123 (Alexander Hamilton).

199. *See, e.g.*, THE FEDERALIST NO. 23, *supra* note 15, at 121 (Alexander Hamilton) ("The circumstances that endanger the safety of the nation are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."); THE FEDERALIST NO. 30, *supra* note 15, at 158 (Alexander Hamilton) ("[The Union's] future necessities admit not of calculation or limitation; and upon the principle more than once averted to the power of making provision for them as they arise ought to be equally unconfined."); THE FEDER-

in his assertions that “commensurate” power requires a government to have the full power necessary to manage the matters assigned to it—a standard which implies that such a government ought not to be burdened, whenever possible, with extraneous constraints that might hinder the exercise of these powers.

The territorial constraints on state governmental action—including the “limited territorial jurisdictions” highlighted by Justice Black—plainly prevented the states from attaining the Founders’ standard of “commensurate” governance in their efforts to manage interstate matters. For centuries, the modern (i.e., Westphalian) concept of sovereignty has defined the state as a territorial entity, and this definition has the consequence of sharply curtailing a state government’s ability to act beyond its borders.²⁰⁰ This territorial constraint cuts across the legislative and judicial branches in the limitations it places on a government, imposing a host of impediments upon any state’s effort to take full, fair, and efficient action upon any problem that extends across multiple states.²⁰¹ If the Founders wanted to ensure that interstate interests received “commensurate” governance, therefore, they would need to assign these interests to the federal government. This is precisely what they did—a fact that lends support to Justice Black’s thesis that the harmony-based powers were given to the federal government out of a desire to ensure interstate problems receive “fully capable” governance.

In the words of James Wilson, the Constitution presented a “comprehensive plan”—and it did so, as Wilson put it, by ensuring that the federal government would succeed in “embracing[] and surrounding the vast properties and interests of the continent.”²⁰² Wilson was here using a geographic definition of the term “comprehensive” that was common among the Founders (a usage that can be heard in Publius’s reference to “the State comprehending the seat of Govern-

ALIST NO. 31, *supra* note 15, at 163 (Alexander Hamilton) (arguing that, since the extent of the problems that will face future governments usually cannot be determined *ex ante*, a government “ought to know no other bounds than the exigencies of the nation and the resources of the community”).

200. See, for example, the discussion of Westphalian sovereignty in KRASNER, *supra* note 14, at 193.

201. One scholar, describing the way that sovereign theories provide the point of unity across disparate branches of government, has said: “at least since the sixteenth century, sovereignty has been made to stand for a principle of unity which draws together the multiplicity of powers within the political realm, dispelling the fragmentation of authority by tracing its ‘marks’ back to a common point of origin.” Hent Kalmo and Quentin Skinner, *Introduction to SOVEREIGNTY IN FRAGMENTS* 14 (Hent Kalmo & Quentin Skinner eds., 2010). Hent Kalmo and Quentin Skinner wrote this in their effort to summarize the contribution made by a particular essay by Denis Baranger. See *id.*

202. 3 FARRAND’S RECORDS, *supra* note 3, at 142 (Statement of James Wilson).

ment,”²⁰³ for example, or in Publius’s mention of state legislators’ tendencies “to sacrifice the comprehensive and permanent interest of the State, to the particular and separate views of the counties or districts in which they reside”²⁰⁴). As Wilson explained, the federal government would be “comprehensive” in the geographic sense; it would ensure that “vast . . . interests” were overseen by an equally vast territorial sovereign that was empowered to govern them without interference from state territorial borders. And by opening federal courts to cases in which “citizens of other States . . . *may be interested*,” as the Virginia Plan had put it,²⁰⁵ diversity jurisdiction would help advance this broader purpose regarding “vast” interstate interests. In so doing, it would serve a specific purpose outlined by Publius regarding these interests: namely, it would make certain that these “interests of the nation [were not entrusted] to hands, which are disabled from managing them with vigor and success.”²⁰⁶ These controversies would not be trusted, in other words, to the state courts, since these courts in many ways had their hands tied with regard to matters that occurred, or parties that resided, in neighboring states.

VII. NATIONAL HARMONY AND STATE COURT BIAS

When the Founders were asked to explain their decision to provide federal courts with diversity jurisdiction, they often would highlight a particular benefit that diversity jurisdiction would provide: it would afford out-of-state litigants, they noted, with a means by which to avoid potentially biased state courts. These founding-era statements, it should be noted, are not in conflict with the theory of diversity jurisdiction that has been outlined in the foregoing pages; state court bias can be viewed simply as one subset of the larger category of the territory-based constraints that was the focus of “commensurate” government for the Founders. Consequently, the mere fact that several Founders explained diversity jurisdiction as a way to avoid bias in state courts does not mean that they were not, at the same time, speaking to the broader purpose of avoiding territorial constraints.

In fact, as Part VI explained, it was exceedingly common for the Founders to highlight the most popular and immediate benefits that were expected to result from the clauses that implemented their broad

203. THE FEDERALIST NO. 43, *supra* note 15, at 240 (James Madison).

204. THE FEDERALIST NO. 46, *supra* note 15, at 264 (James Madison). *See also* THE FEDERALIST NO. 18, *supra* note 15, at 94 (James Madison) (describing an Achean confederacy “which comprehended the less important cities only”); THE FEDERALIST NO. 51, *supra* note 15, at 292 (James Madison) (speaking of interests and sects as dependent upon “the extent of country and number of people comprehended under the same government”).

205. 1 FARRAND’S RECORDS, *supra* note 3, at 21–22 (Madison’s Notes, May 29, 1787) (emphasis added).

206. THE FEDERALIST NO. 23, *supra* note 15, at 123 (Alexander Hamilton).

vision of “commensurate” government.²⁰⁷ There is little reason to think that the purpose of these clauses was limited to the benefits highlighted in these discussions, however—a point that has been recognized with regard to the Commerce Clause, yet that seems to have eluded lawyers and scholars with regard to the Diversity Clauses. In fact, the proper relationship between these two purposes can be directly observed in Publius’s discussion of judicial bias in *Federalist* 80—in particular, in Publius’s distinctive use of the term “partial” within this discussion.²⁰⁸

When Publius gives his initial enumeration of the objects to which the judicial power ought to reach, he describes diversity jurisdiction as extending “to all those [causes] in which the state tribunals cannot be supposed to be impartial and unbiassed.”²⁰⁹ Given the seemingly logical nature of the concern about local bias in state courts, as well as Publius’s explicit articulation of this concern, it is easy to read “impartial” as functioning in this sentence simply as a synonym for “unbiassed,” and therefore as merely providing an additional reference to the central concern about preferential state courts.

To interpret “partial” in this manner, however, is to forget that Publius consistently uses the term “partial” in *The Federalist Papers* to mean that a problem or activity literally resides within a geographic part, or a political subdivision, of the nation—usually, within a state. The term “partial” is used repeatedly by Publius in the Article I context to distinguish local or intrastate concerns from national concerns. Publius warns against those policies that would serve “the *partial* interests of each confederacy, instead of the *general* interests of all America.”²¹⁰ He separates the wisdom of “councils of the *whole*” from “the ill-informed and prejudiced opinion of every *part*.”²¹¹ With regard to maritime trade, he says: “This branch of trade ought not to be considered as a *partial* benefit. *All* the navigating States may, in different degrees, advantageously participate in it.”²¹² When discussing the need for a federal navy, he similarly says: “A navy of the United States, as it would embrace the resources of *all*, is an object far less remote than a navy of any *single* State or *partial* confederacy, which

207. See *supra* notes 183–84 and accompanying text.

208. THE FEDERALIST NO. 80, *supra* note 15, at 443 (Alexander Hamilton)

209. *Id.*

210. THE FEDERALIST NO. 5, *supra* note 15, at 19 (John Jay) (emphasis added).

211. THE FEDERALIST NO. 15, *supra* note 15, at 80 (Alexander Hamilton) (emphasis added). With reference to states, he also contrasts “a whole State,” THE FEDERALIST NO. 28, *supra* note 15, at 146 (Alexander Hamilton), with “a small part of a State,” *id.*, and speaks of “the existence of partial disorders in one or two of [a state’s] counties.” THE FEDERALIST NO. 25, *supra* note 15, at 134 (Alexander Hamilton).

212. THE FEDERALIST NO. 11, *supra* note 15, at 56 (Alexander Hamilton) (emphasis added).

would only embrace the resources of a *part*.”²¹³ And returning to the metaphor of a national “body,” he says of the power to suppress insurrections: “As to those *partial* commotions and insurrections which sometimes disquiet society from the intrigues of an inconsiderable faction, or from sudden or occasional ill humors that *do not infect the great body of the community*, the general government could command more extensive resources for the suppression”²¹⁴ With each of these classifications—of an activity as *national* or *partial*—Publius develops a vocabulary to describe the differences he perceives in the geographic scope of various activities in need of regulation throughout America.²¹⁵

Read in the context of these discussions of “partial” powers, the description in *Federalist 80* of federal courts as “impartial or unbiassed” fora for diversity cases takes on a new light. It becomes a discussion that connects the concern about biased state courts to a larger concern about the ability of state governments to oversee interstate problems. Publius uses the rhetoric of “partial” powers in *Federalist 80*, in other words, to make clear that state court bias was understood to be analogous to many problems addressed in the Article I context—and that it was analogous because it, too, was connected to a larger concern regarding state efforts to oversee activities that extended across multiple states.

This relationship—between the specific concern (state court bias) and the broader concern (the territorial limits on sovereign statehood)—is further revealed in *Federalist 80* by a second purpose that Publius says diversity jurisdiction will fulfill. According to Publius, diversity jurisdiction not only will allow litigants to avoid potentially-biased state courts; it also will independently promote “the PEACE of the CONFEDERACY.”²¹⁶ Discussing this virtue, Publius first observes that a failure to provide federal courts with alienage jurisdiction could lead to a war that would engulf the several states, and since “the peace of the WHOLE ought not to be left at the disposal of a PART,” the federal government ought to preside over these politically sensitive cases.²¹⁷

In this passage, alienage jurisdiction is not justified by any notion that the promotion of peace is a distinctly important virtue in the Constitution. Rather, it is justified by recourse to the idea that a war on American soil would inevitably spread across multiple states. It is a

213. *Id.* at 57 (emphasis added).

214. THE FEDERALIST NO. 16, *supra* note 15, at 85 (Alexander Hamilton) (emphasis added).

215. The same distinction is found in Thomas Paine’s *Common Sense*, which refers to a: “frequent interchange [that] will establish a common interest with every part of the community.” PAINE, *supra* note 92, at 67 (emphasis added).

216. THE FEDERALIST NO. 80, *supra* note 15, at 443 (Alexander Hamilton).

217. *Id.* at 444.

justification that returns to a familiar vision of federal power, as it reasserts the commitment to providing federal oversight of concerns that are shared by a population that extends across the several states. These interstate concerns are contrasted, importantly, with intrastate concerns—which is to say, with concerns that can be contained, as Publius puts it, within “a PART” of the nation.

Turning then to the idea that cases involving diversity jurisdiction also threaten “the PEACE of the CONFEDERACY,” Publius returns to the same binary found in the discussion of alienage jurisdiction. Just as that discussion had labeled multistate concerns as concerns “of the WHOLE,” Publius’s discussion of diversity jurisdiction presents matters that are “between the States” as concerns “of the empire.”²¹⁸ Moreover, Publius returns in this analysis to the idea of a national body, as he explains that there is a need to diagnose those problems and conflicts that are “among” or “between” the sovereign organs that comprise this body.²¹⁹ In these regards, diversity jurisdiction is presented, like alienage jurisdiction, as a way of enacting the idea that a concern “of the WHOLE ought not to be left at the disposal of a PART.”²²⁰

Publius’s discussions of diversity jurisdiction, therefore, are no different from his analyses of many of the enumerated legislative powers. In each instance, Publius does the following: he asserts that interstate problems require federal oversight; he separates “national” from “partial” problems through a process that repeatedly labels problems occurring “among” or “between” the states as “national” problems; and he discusses some benefits that illustrate why the application of this rule creates a sound policy with regard to the particular problem at hand. With regard to diversity jurisdiction, however, subsequent lawyers and scholars have focused entirely upon one illustrative benefit, and they have failed to notice the ways that this particular benefit is intertwined with the underlying principle of the design. The result has been a systematic neglect of the deeper constitutional purpose that diversity jurisdiction was designed to advance.

VIII. IMPLICATIONS

A. The Purpose of Diversity Jurisdiction

The harmony-based theory of diversity jurisdiction has several noteworthy implications. For example, there are at least three important senses in which the harmony-based theory of diversity jurisdiction responds to the scholarly discussion analyzed in Part II regarding the original purpose of diversity jurisdiction. First, and most obvi-

218. *Id.* at 445.

219. *Id.*

220. *Id.* at 444.

ously, it introduces a new theory into this discussion. According to this theory, diversity jurisdiction is not designed simply to combat state court bias against out-of-state litigants, or to avoid enforcement of anti-creditor legislation. Rather, it is broadly designed to prevent state boundaries from impeding judicial efforts to dispose of controversies in the most fair and efficient manner possible.

Second, the harmony-based theory teaches a different lesson about constitutional structure than do most of the theories outlined in Part II. According to many of these theories, diversity jurisdiction was an attempt to troubleshoot one or another isolated problem that afflicted a particular branch of state government in the Founding era. Did diversity jurisdiction emerge from a concern about potentially-biased state court judges, this scholarship has asked, or did it respond to fears of anti-creditor sentiments among state legislators? The emphasis of such studies is often upon a single, concrete problem occurring at the state level, in other words, and the implication is that diversity jurisdiction can be adequately understood in isolation from other constitutional provisions. By contrast, when diversity jurisdiction is viewed as an effort to address situations involving national “harmony,” it is revealed to grow out of a broad skepticism regarding the ability of any branch of state government to provide “commensurate” government with regard to interstate matters. It is shown to be connected to various Article I powers in its text, its drafting history, and its conceptual foundations.²²¹

Finally, as Part II explained, twentieth-century theories about the purpose of diversity jurisdiction often have been connected to calls for its abolition. Once diversity jurisdiction is viewed as part of a broad effort to target the myriad territorial constraints that impede state courts in their efforts to resolve interstate controversies, these calls for its abolition take on a new light. Almost since the Founding, diversity jurisdiction has been confined to one subset of its proper functions—namely, the prevention of bias against out-of-state parties. It should not be surprising, therefore, that as some lawyers and scholars sense this bias to be vanishing from state courts, many now find diversity jurisdiction to be of limited utility. From this perspective, the calls for its abolition appear to be the inevitable symptoms of a legal system that has not allowed diversity jurisdiction to fulfill the full scope of its intended functions.

B. Federal Court Personal Jurisdiction

The harmony-based theory of diversity jurisdiction also has implications for the federal courts that reach beyond the scholarly debates outlined in Part II. One such implication is in the area of federal court

221. *See supra* Part V.

personal jurisdiction. Personal jurisdiction rules have consistently tied federal courts to the very state boundaries these courts were designed to transcend. For originalists, therefore, this study of diversity jurisdiction should have a clear implication: if the modern-day Congress wants to keep faith with the Founders’ vision for the federal courts, it suggests, Congress should consider relaxing the federal court personal jurisdiction standards that undermine this vision.

The standards of federal court personal jurisdiction have their origin in section eleven of the Judiciary Act of 1789, which specified that:

[N]o person shall be arrested in one district for trial in another, in any civil action before a circuit or a district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ²²²

Since section two of this Act specified that each state would constitute a federal judicial district (except for Massachusetts and Virginia, each of which would be subdivided into two separate judicial districts), this meant that the jurisdictional reach of each federal court would be defined by state boundaries.²²³ The references to judicial “district[s]” in section eleven meant that this was true even in the circuit courts that had original jurisdiction over diversity cases.²²⁴ By tethering the jurisdictional reach of each federal court to the boundaries of the state in which the court resided, the Judiciary Act of 1789 therefore would bind these courts to the very jurisdictional constraints that a geographically “commensurate” government was designed to transcend: the sovereign constraints entailed by state territorial borders that limited state governments.

However, the Judiciary Act of 1789 was passed a mere two years after the drafting of the Constitution, and many members of the first Congress had been delegates to the Constitutional Convention. Consequently, it might be asked: can we not presume that the Judiciary Act of 1789 was a faithful expression of the Founders’ true intent with regard to the structure of the federal judiciary?

There are a variety of reasons to doubt this presumption. A great deal had changed in American politics between 1787 and 1789. First, many of the individuals who had been the strongest advocates on behalf of the broad, harmony-based vision of diversity jurisdiction at the Convention either could not, or would not, provide this support in the first Congress. While Hamilton continued to argue on behalf of a strong federal judiciary that would disregard state boundaries, he did so in 1789 from his position as Secretary of the Treasury, not as a

222. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

223. See Judiciary Act of 1789 § 2, 1 Stat. at 73.

224. Judiciary Act of 1789 § 11, 1 Stat. at 78.

member of Congress.²²⁵ Hamilton's most powerful ally in this regard, George Washington, was now serving as President and no longer physically loomed over the debates, as he had at the Convention. James Madison's enthusiasm for his earlier vision of a robust federal government had begun to wane, meanwhile, an intellectual progression that would lead to his alliance with Jefferson in opposition to Hamilton in the ensuing years.²²⁶

Second, Antifederalists had stirred up grand fears of a robust national judiciary during the ratification debates surrounding the Constitution—fears that may not have existed in equal force before these Antifederalists excited public worries about a national judiciary that might deny basic protections such as the trial by jury.²²⁷ The committee that drafted the Judiciary Act of 1789 was aware of these public fears, and it was responsive to them—something which the Convention could not have been.²²⁸

Third, in 1789, the members of Congress were engaged in the mundane act of passing legislation, not the grand challenge of drafting a Constitution. The different nature of these tasks itself suggests the possibility that the conceptual clarity of the original Diversity Clauses may have given way to the more tedious realities of bickering and compromise that are the hallmarks of ordinary legislation. Indeed, Gordon Wood has called the Judiciary Act of 1789 “an ingenious bundle of compromises that allayed many of the Antifederalist suspicions.”²²⁹ Both the mood of compromise, and the suspicions it allayed, may not have existed in 1787 as they did in 1789. Consequently, there seem to be good reasons for avoiding the presumption that the federal

225. See GORDON WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 408–14 (2011).

226. By 1792, Hamilton could write in a letter to Edward Carrington that:

“I cannot persuade myself that Mr. Madison and I, whose politics had formerly so much the *same point of departure*, should now diverge so widely in our opinions of the measures which are proper to be pursued This kind of conduct [i.e., Madison resisting the formation of a national bank as unconstitutional] has appeared to me the more extraordinary on the part of Mr. Madison as I know for a certainty it was a primary article in his Creed that the real danger in our system was the subversion of the National authority by the preponderancy of the State governments.”

Letter of Alexander Hamilton to Edward Carrington, *reprinted in* NOBLE E. CUNNINGHAM JR., *JEFFERSON VS. HAMILTON: CONFRONTATIONS THAT SHAPED A NATION* 88–90 (2000).

227. According to Gordon Wood: “Ellsworth and his committee [established to draft judiciary bill] wanted a separate federal court system. At the same time, however, they were well aware of the fears of a national judiciary that the Anti-Federalists had aroused during the ratification debates, especially fears of a national judiciary that omitted certain common law rights like trial by jury.” WOOD, *supra* note 225, at 409.

228. *Id.*

229. *Id.*

personal jurisdiction standards asserted in 1789 spoke for the Philadelphia Convention as well as for the first Congress.

Moreover, even if the Constitutional Convention would have supported some form of personal jurisdiction limits on the federal courts—and there is evidence that at least a few of the delegates would have supported these limits²³⁰—this tells us little about the proper application of the Founders’ vision to a modern world in which interstate economic activity is commonplace. In the eighteenth century, when interstate activity was comparatively rare, it might have been acceptable to leave dormant some measure of the constitutional solution for interstate legal controversies, and personal jurisdiction limits undermining this solution might have been tolerable. During the decades following the Civil War, however, a national economy emerged that paid little regard to the boundaries of the individual states, and by the mid-twentieth century, interstate business had become far more common than ever previously imagined. In this modern context, the continued neglect of the constitutional vision embedded in the Diversity Clauses should be viewed as problematic by originalists, as it undermines an original purpose of the federal courts that has a clear role to play in modern-day America.

Nonetheless, in the years since the Judiciary Act of 1789, congressionally-imposed rules of federal court personal jurisdiction have continued to tie the federal courts to constraints similar to those found in that Act. Rule 4(k) of the Federal Rules of Civil Procedure explicitly bases federal court personal jurisdiction upon the limits of personal jurisdiction for a similarly situated state court.²³¹ While the Federal Rules of Civil Procedure have expanded federal court personal jurisdiction in some regards, therefore, these federal court rules nonetheless continue to mimic the effects of state territorial lines in constraining the power of these courts, thereby undermining a set of

230. See 3 DEBATES, *supra* note 3, at 556 (statement by Marshall presuming statewide personal jurisdiction); *id.* at 549 (statement by Pendleton). But see *id.* at 535–36 (statement by Madison in the same debate that did not cite Marshall’s reasoning on personal jurisdiction); *id.* at 526, 551 (statements by Mason presuming nationwide personal jurisdiction, though later relenting that original jurisdiction might be more limited); WOOD, *supra* note 225, at 408 (noting that Hamilton felt in 1789 that Congress should have established “national judicial districts that cut through state lines”).

231. The general rule states that: “Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.” FED. R. CIV. P. 4(k)(1). Rule 4(k)(1) applies in the overwhelming majority of cases. Rule 4(e) specifies the rules for extraterritorial service of process in those instances in which such service is permitted. See FED. R. CIV. P. 4(e).

Diversity Clauses that were designed to allow federal courts to transcend such boundaries.²³²

C. State Court Personal Jurisdiction

In response to the interstate economy that emerged in America in the early twentieth century, a set of New Deal reforms empowered the federal government to oversee this national economy and to regulate it in new and vital ways. This New Deal effort turned to federal legislation as the primary vehicle by which to assert control over the newly ascendant economic forces in America—and, not surprisingly, this effort found its constitutional ballast in the power that Hamilton had said was designed to oversee the “veins of commerce” that might run throughout the nation: the commerce power.²³³

The result is the well-known story of Commerce Clause jurisprudence in the twentieth century. Beginning in 1937 with the Court’s opinion upholding a crucial provision of the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel*,²³⁴ the Court issued a series of opinions making clear that the new multistate business operations prevailing throughout the nation fell within the scope of the Article I commerce power.²³⁵ As the Court noted in *Jones & Laughlin Steel*, a turn to the commerce power made sense because, as the Labor Board had previously observed, a company such as the Jones & Laughlin Steel Corporation “might be likened to the heart of a self-contained, highly integrated body.”²³⁶ Such corporations “draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they

232. In the years since the Court articulated Fourteenth Amendment standards of due process for state court personal jurisdiction, there has been some debate about the constitutionality of nationwide federal court personal jurisdiction under the Due Process Clause of the Fifth Amendment. See, e.g., Terry Park, *National vs. Forum Contacts: Does ERISA’s Nationwide Service of Process Automatically Constitute Federal Personal Jurisdiction?*, 32 SW. U. L. REV. 527 (2003); David S. Welkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1 (1987); Pamela J. Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. RICH. L. REV. 697 (1984). According to the interpretation of the Diversity Clauses developed in the foregoing pages, however, nationwide jurisdiction not only is permissible, but, in a time of nationalized economic activity, is the approach that is most consistent with the purpose of these Clauses.

233. THE FEDERALIST No. 11, *supra* note 15, at 57 (Alexander Hamilton).

234. 301 U.S. 1 (1937).

235. See, e.g., *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941) (expanding Congress’s power under the Commerce Clause beyond the limits imposed by the Court on that power in the *Lochner* era); *Wickard v. Filburn*, 317 U.S. 111 (1942) (same); *but see Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (defining the limits of the Commerce Clause by holding that Congress cannot force citizens to become active participants in interstate commerce).

236. 301 U.S. at 27.

transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated.”²³⁷ After four decades of inconsistent jurisprudence that sometimes articulated a very narrow vision of the commerce power,²³⁸ *Jones & Laughlin Steel* thus marked a return to the vision of the commerce power articulated in *The Federalist Papers*—a vision embodied in the metaphor of commerce as a circulatory system that reaches across state lines within the body politic, and that consequently warrants federal oversight.²³⁹ While the Court sometimes would go beyond this originalist vision and articulate a distinctively New Deal vision of the Commerce Clause—particularly in cases in which it was more difficult to identify interstate activity—the Court nonetheless did revisit and at times build upon an originalist vision of federal power as part of this broader effort.

Since the Diversity Clauses were integral to the Founders’ larger vision of the federal government providing oversight of interstate problems, one might reasonably expect that, as the Commerce Clause received new emphasis and expanded interpretation in the 1930s, the Diversity Clauses would similarly benefit from a renewed attention to their core purpose. As Subpart B explained, however, this did not occur. Instead, beginning in 1945 with the case of *International Shoe Co. v. Washington*,²⁴⁰ the Court focused upon an alternative solution: expanding the personal jurisdiction of the state courts.

Agreeing with the Court’s prior assessment in *Pennoyer v. Neff* that state court personal jurisdiction was constrained by the Due Process Clause of the Fourteenth Amendment,²⁴¹ the Court famously reinterpreted this Clause in *International Shoe*, claiming that it only required a defendant to have “minimum contacts” with a state in order for that state’s courts to have jurisdiction over related claims brought against that defendant.²⁴² This “minimum contacts” test required far less in-state activity than had the prevailing jurisdictional test under *Pennoyer*, and as a consequence, it represented a significant expansion of state court personal jurisdiction over out-of-state defendants.

237. *Id.*

238. For broader interpretations of the commerce power during this period, see, for example, *Hous. E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914); for narrower interpretations, see, for example, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Alton R.R. Co. v. Ill. Commerce Comm’n*, 305 U.S. 548 (1939).

239. The Article III bestowal of federal question jurisdiction upon the federal courts, as well as the grant of such jurisdiction by statute, meant that the New Deal’s increase in congressional lawmaking inevitably would be accompanied by an increasing role for the federal courts in the nation’s legal scheme, of course.

240. 326 U.S. 310 (1945).

241. See *Pennoyer v. Neff*, 95 U.S. 714 (1878).

242. *Int’l Shoe*, 326 U.S. at 316.

In subsequent years, the Court would openly acknowledge that the doctrinal shift in *International Shoe* was directly attributable to the rise of a national economy, saying that:

Looking back over this long history of [jurisdiction cases,] a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines.²⁴³

It is not surprising that state court personal jurisdiction became the vehicle by which the Court addressed the need for increased judicial oversight of interstate legal controversies. As I will explain in a future article, this approach made sense as a coherent part of a larger New Deal constitutional project.²⁴⁴ Moreover, there were practical reasons that counseled toward this approach. The Madisonian compromise meant that the personal jurisdiction standards for federal courts were set by Congress, thus requiring the Court to override the express will of Congress in order to assert a harmony-based vision of the Diversity Clauses—something that was exceedingly unlikely when the Court could simply revise a state court personal jurisdiction standard it had itself fashioned in *Pennoyer*. Moreover, the Diversity Clauses had fallen into disrepute among many lawyers and scholars by 1945, particularly among those who were sympathetic to New Deal reforms. The manipulative uses of diversity jurisdiction by corporations throughout the early years of the twentieth century had trained these individuals to view diversity jurisdiction as an unfortunate vehicle for corporate interests, not as a potential means of expanding jurisdiction over such corporations.²⁴⁵ The result was a situation in which few were likely to perceive that diversity jurisdiction was designed to provide federal oversight of those legal controversies that related to the “veins of commerce” that extended across multiple states.

State court jurisdiction undeniably provided an awkward solution to the jurisdictional problems made evident by the New Deal, however, and the Court’s approach clearly has given rise to difficulties that the Founders’ solution would have avoided.²⁴⁶ For centuries, prevailing notions of sovereignty have linked sovereign power to the territorial limits of the sovereign entity. By entrusting interstate

243. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957). The Court would cite this passage and repeat this language in the important case of *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

244. Cross, *supra* note 29.

245. *See generally* Purcell, *supra* note 41.

246. Over the last several decades, the Court has struggled to unite a majority behind any single test or theory of personal jurisdiction. *See, e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (majority only for Parts I and II.B); *Burnham v. Superior Court*, 495 U.S. 604 (1990) (plurality opinion); *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (plurality opinion).

controversies to the federal government, the Diversity Clauses posed no challenge to this territorial dimension of sovereignty; instead, they simply assigned these controversies to a more territorially-expansive sovereign. By contrast, viewing interstate controversies as subject to the jurisdiction of state courts requires a more fundamental revision of the concept of state sovereignty. It overrides the territorial theory of sovereignty with regard to the states—and the Court was not necessarily prepared to replace this theory with a new, clear vision of sovereignty that might operate in its stead. The result has been a jumbled jurisprudence, as the Court has attempted in each personal jurisdiction case since *International Shoe* to provide a new answer to the question: if state court jurisdiction is not limited to the rigid boundaries of territorial sovereignty, then what provides the proper limits of a court’s exercise of sovereign power?²⁴⁷

D. The Class Action Fairness Act of 2005

The exercise of diversity jurisdiction by a federal court typically occurs pursuant to congressionally-enacted rules that, like the rules discussed in the foregoing pages, prevent these courts from ever approaching the constitutional limits of their jurisdictional powers under the Diversity Clauses. In a few instances, however, Congress has attempted to journey toward the outer limits of this constitutional power by granting federal courts extremely broad authority to exercise diversity jurisdiction. In such situations, an awareness of the underlying purpose of the Diversity Clauses becomes particularly important.

In recent years, the Class Action Fairness Act of 2005 (CAFA) has drawn the most attention for its broad authorization of federal court diversity jurisdiction.²⁴⁸ As Part II explained, CAFA required certain class actions to meet a requirement only of minimum diversity. In the “Findings and Purposes” section of CAFA, Congress stated that it understood the Act to be pursuant to the original purpose of diversity jurisdiction, a purpose which included providing federal court oversight of “interstate cases of national importance,” preventing bias against-out-of-state litigants, and preventing states from imposing their laws upon other states.²⁴⁹ At the same time, CAFA implemented policies that could not be justified as attempts to avoid situations of state court bias against out-of-state litigants—policies such as

247. For a discussion of the conflicting tests and theories that the Court has outlined in successive cases in this area, see, for example, Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987).

248. Pub. L. 109-2, 119 Stat. 4 (2005).

249. *Id.* at § 2.

allowing for federal court removal in cases filed in the defendant's home state.

Consequently, CAFA has raised concerns among lawyers and scholars in part because it unambiguously extends diversity jurisdiction beyond what many believe is the sole purpose of diversity jurisdiction: the prevention of state court bias against out-of-state parties. One scholar has even argued that the Act is unconstitutional because it does not amount to a "necessary and proper" effort to combat state court bias, and instead includes elements that are "baldly . . . predicated on the need to achieve judicial and litigant economy."²⁵⁰ When diversity jurisdiction is viewed from a harmony-based perspective, however, judicial and litigant economy are seen to be constitutionally legitimate purposes under the Diversity Clauses, so long as they are directed at impediments to economy that arise on account of sovereign or jurisdictional boundaries. From this perspective, provisions of CAFA that otherwise might be objectionable appear to be constitutionally permissible (and even encouraged) under Article III.

This point is nicely illustrated by the fact that CAFA permits class actions brought in federal court under the Act to be transferred, albeit in limited circumstances,²⁵¹ as multidistrict litigation (MDL) under section 1407 of title 28, United States Code.²⁵² The MDL process allows sets of similar federal cases to be transferred to a single district court for pretrial proceedings; it is a process that removes personal jurisdiction and venue considerations in order to avoid duplicative pretrial proceedings, thereby managing federal dockets more efficiently.²⁵³ In steering litigation toward the MDL process, the Judicial Panel on Multidistrict Litigation is expressly directed to act in order to promote convenience for relevant parties, judicial efficiency, and overall fairness. By providing the opportunity for increased numbers of cases to be treated via the MDL process, it can be argued, CAFA thereby uses the federal courts as a means to override jurisdictional boundaries in a manner designed to promote judicial fairness and efficiency—a use of the federal courts that plainly is contemplated by the harmony-based purposes of diversity jurisdiction.

This is not to say that CAFA raises no concerns from a harmony-based perspective of diversity jurisdiction, however. When viewed skeptically, the discussion of constitutional intent in CAFA can be interpreted as convenient window-dressing on an Act that is simply re-

250. Floyd, *supra* note 67, at 694.

251. A majority of the plaintiffs must request the transfer under CAFA. See 28 U.S.C. § 1332(d)(11)(C)(i) (2012).

252. 28 U.S.C. §1407 (2012).

253. See *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue.").

sponding to the litigation preferences of industries that possess the clout and the resources necessary to get the attention of Congress.²⁵⁴ Viewed as such, CAFA can be seen as a cautionary tale regarding the view that diversity jurisdiction is simply permissive, not purposive.²⁵⁵ Discussions of the minimal diversity requirement are often conducted by asking: what do the Diversity Clauses permit? In *State Farm Fire and Cas. Co. v. Tashire*, the paradigmatic case regarding minimal diversity, for example, the Court simply stated that Article III “poses no obstacle” to an extension of jurisdiction in a situation of minimal diversity.²⁵⁶

By only asking whether the Diversity Clauses pose an “obstacle” to jurisdiction in a particular case, *Tashire* and similar cases encourage the notion that diversity jurisdiction ought to be subject to the same logic that Paul Bator articulates in the context of federal question jurisdiction when he says that: “[T]he question whether access to the lower federal courts was necessary to assure the effectiveness of federal law should not be answered as a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment”²⁵⁷ This sort of deference to the political process—and to the interest groups that often shape it—is only enhanced when lawyers and scholars do not perceive this process to be operating in the context of a logical, coherent, and relevant constitutional principle against which they can evaluate this process and its influence on governmental operations. So long as the Diversity Clauses are viewed as simply deferring to the political process, or as being animated by a purpose that is no longer relevant, it contributes to the likelihood that congressional articulations of the purpose of diversity jurisdiction will operate as window-dressing for interest-group politics even when those politics undermine the original, harmony-based vision of diversity jurisdiction embraced by the Founders more than two centuries ago.

254. There is some evidence that, if this was indeed Congress’s intent, CAFA may have backfired, as there have been more initial filings than cases on remand. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS* (2008).

255. The permissive view is reinforced by scholars who argue that diversity jurisdiction was a matter of little importance and scant debate at the Convention. *See, e.g.,* Friendly, *supra* note 35, at 484 (“A search of the letters and papers of the men who were to frame the Constitution does not reveal that they had given any large amount of thought to the construction of a federal judiciary. Certain it is that diversity of citizenship, as a subject of federal jurisdiction, had not bulked large in their eyes.”).

256. 386 U.S. 523, 531 (1967).

257. Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982). Bator argues that this is implicit in the nature of the Madisonian Compromise.